IN THE SUPREME COURT OF OHIO

Ohio Power Company,	**:**	**Supreme Court Case No. 2024-____**
Complainant/Appellant	**:**	
	:	**Appeal from the Public Utilities**
v.	**:**	**Commission of Ohio**
	:	
Nationwide Energy Partners, LLC,	**:**	**Public Utilities Commission of Ohio**
Respondent	**:**	**Case No. 21-990-EL-CSS**

NOTICE OF APPEAL OF OHIO POWER COMPANY

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NOTICE OF APPEAL OF OHIO POWER COMPANY

Appellant, Ohio Power Company (AEP Ohio), hereby gives notice of its appeal, pursuant to R.C. 4903.13 and Supreme Court Rule of Practice 10.02(A)(1)-(2), to the Supreme Court of Ohio and Appellee, the Public Utilities Commission of Ohio (Commission), from an Opinion and Order entered on September 6, 2023 (Attachment A) and Second Entry on Rehearing entered on December 13, 2023 (Attachment B) in Case No. 21-990-EL-CSS.

AEP Ohio timely filed an Application for Rehearing of the Commission's September 6, 2023 Opinion and Order in accordance with R.C. 4903.10 (Attachment C). AEP Ohio raised the assignments of error listed below in its Application for Rehearing. This notice of appeal by AEP Ohio is timely pursuant to R.C. 4903.11 and S.Ct.Prac.R. 10.02(A)(1)-(2). The Commission's September 6, 2023 Opinion and Order and the December 13, 2023 Second Entry on Rehearing (collectively, the "Commission's Orders") are unlawful and unreasonable in the following respects, all of which were raised and preserved in AEP Ohio's Application for Rehearing ("AFR") at the pages indicated below:

I. The Commission's "Narrow and Limited" Ruling in Favor of Nationwide Energy Partners, LLC ("NEP") on Part 2 of NEP's Count I Is an Unreasonable and Unlawful Application of the Complaint Case Statute, R.C. 4905.26. (AFR at 16-17.)

A. The Complaint Case Statute, R.C. 4905.26, Is a Jurisdictional and Procedural Mechanism, Not an Independent Standard that Entities Can "Violate." (AFR at 17-23.)

B. It Is Unreasonable to Fault AEP Ohio for Its Actions Following the Dismissal of the Complaint in *Wingo v. Nationwide Energy Partners, LLC*, Pub. Util. Comm. No. 17-2002-EL-CSS, Because AEP Ohio Faced an Uncertain Legal Issue with No Guidance from the Commission, and AEP Ohio Acted in Good Faith and Simultaneously Brought the Issue to the Commission for Decision. (AFR at 23-30.)

C. The Commission Denied AEP Ohio Its Right to Due Process of Law by Finding that AEP Ohio "Violated" a Rule That Did Not Exist at the Time. (AFR at 31-35.)

II. The "Electric Reseller Tariff" Ordered by the Commission Is Unreasonable and Unlawful Under the Commission's Own Interpretation of "Electric Light Company" Under R.C. 4905.03(C), Violates the Statutory Rulemaking Procedures in R.C. Chapter 106, and Results in an Unreasonable Tariff Paradigm. (AFR at 36-37.)

A. The Commission's Reinstatement of the "SSO Price Test" Through a Tariff Contravenes the Express Instructions of the Supreme Court's Remand Order in *Wingo v. Nationwide Energy Partners, LLC*, 163 Ohio St.3d 208, 2020-Ohio-5583. (AFR at 38-41.)

B. By Ordering the "Electric Reseller Tariff," the Commission Expanded the Scope of Its Disconnection Rules (Ohio Adm.Code 4901:1-18) and Enacted Other Rules of General Applicability Without Following the Statutory Rulemaking Procedures in R.C. Chapter 106.

1. The Commission Did Not Provide AEP Ohio and other interested parties Adequate Notice and Opportunity to Be Heard. (AFR at 41-42.)

2. The Commission Discriminatorily Ordered Protections for Certain, but Not All, Tenants in the State of Ohio. (AFR at 42-43.)

3. The Commission Failed to Follow Mandatory Statutory Procedures Required to Amend the Administrative Rules. (AFR at 44-46.)

C. It Is Unlawful and Exceeds the Commission's Statutory Jurisdiction Under R.C. 4905.03(C) for the Commission to Conclude that NEP (and Landlords) Are Not "Electric Light Companies" and Yet Regulate Them Through AEP Ohio's Tariff's as if They Were. (AFR at 46-47.)

D. The "Electric Reseller Tariff" Is Unworkable for Several Reasons. (AFR at 47-53.)

III. The Commission's Application of the Jurisdictional Statute, R.C. 4905.03(C), to NEP Is Unreasonable and Unlawful and Against the Manifest Weight of the Evidence. (AFR at 53.)

A. The Commission's Definition of "Consumer" in R.C. 4905.03(C) Is Contrary to That Term's Plain Meaning. (AFR at 53-61.)

B. The Commission's Conclusion that NEP Is Not "Engaged in the Business of Supplying Electricity" Under R.C. 4905.03(C) Is at Odds with the Plain Meaning of "in the Business of" and "Supplying" and Incorrectly Credits Formalisms Such as "Agency" That Cannot Be Found in the Statute. (AFR at 61-69.)

C. To the Extent that the Court Determines that the Commission's Ruling was Consistent With the Prior Precedent of this Court that Established a Judicially-Created Exception to R.C. 4905.02, the Court Should Consider Overruling that Precedent as Not Being Properly Grounded in the Controlling Statutes or Revisiting it to Only Apply to Landlords Acting Directly or Not Using Big- Business, Third-Party Submetering Companies Like NEP. (AFR at 64.)

Respectfully submitted,

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CERTIFICATE OF FILING

The undersigned counsel certifies that, in accordance with Supreme Court Rules of Practice 3.11(D)(2), 10.02(A)(1), and 10.02(A)(2), Ohio Power Company's Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio and was served on the Chair of the Public Utilities Commission of Ohio by leaving a copy at the Chair's office in Columbus, Ohio, in accordance with R.C. 4903.13 and Ohio Adm.Code 4901-1-02(A) and 4901-1-36, on this 9th day of February, 2024.

/s/ L. Bradfield Hughes
L. Bradfield Hughes

Counsel for Appellant Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned counsel certifies that, pursuant to Supreme Court Practice Rules 10.02(A)(2)(a), 3.11(B)(1)(a), and 3.11(B) (2), AEP Ohio's Notice of Appeal was served by electronic mail upon counsel for all parties to the case and all parties to the proceeding before the Public Utilities Commission of Ohio identified below on this 9th day of February, 2024.

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THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF OHIO POWER COMPANY,

COMPLAINANT,

v.

CASE NO. 21-990-EL-CSS

NATIONWIDE ENERGY PARTNERS, LLC,

RESPONDENT.

OPINION AND ORDER

Entered in the Journal on September 6, 2023

ATTACHMENT A

TABLE OF CONTENTS

I. SUMMARY

{¶ 1} The Commission finds that Ohio Power Company failed to carry its burden of proving that Nationwide Energy Partners, LLC is (i) engaged in the business of supplying electricity, is an "electric light company" under R.C. 4905.03(C), or a "public utility" under R.C. 4905.02(A); (ii) operating as an "electric supplier" within Ohio Power Company's certified territory in violation of R.C. 4933.83(A); and (iii) violating R.C. 4928.08(B) by supplying or arranging for the supply of a competitive retail electric service without the required certification. With respect to counterclaims filed by the respondent, the Commission finds that Nationwide Energy Partners, LLC failed to carry its burden of proving that Ohio Power Company's actions discussed herein (i) violated R.C. 4905.26, except to the second alleged violation of Count I of its counterclaims where we find in favor of NEP on a limited basis, and (ii) violated R.C. 4905.35(A). Additionally, as discussed herein, the Commission directs AEP Ohio to file an application to modify its electric service resale tariff to include certain provisions related to landlords engaging in the resale of electricity to tenants.

II. BACKGROUND INFORMATION

{¶ 2} On September 24, 2021, the Ohio Power Company (AEP Ohio, the Company, or the Complainant) filed a complaint (Complaint) against Nationwide Energy Partners, LLC (NEP). As background, AEP Ohio states that it is a "public utility" under R.C. 4905.02, an "electric light company" under R.C. 4905.03 and 4928.01, and an "electric utility" and "electric distribution utility" as those terms are defined in R.C. 4928.01. AEP Ohio further explains that it has been granted a service territory under the Certified Territory Act (CTA), within which AEP Ohio has the exclusive right to provide electric distribution service and other noncompetitive electric services. *See* R.C. 4933.83(A). In the Complaint, AEP Ohio states that NEP is an entity engaged in the practice of submetering, whereby NEP, acting as the agent of a landlord or building owner engages in the resale or redistribution of public utility services where the owner of an apartment building or multi-residential complex

divides up a master bill to individual tenants so that each tenant pays for their share of utilities used. AEP Ohio explains that this Complaint arises from a request from NEP, acting as the agent of five apartment complex owners (the Apartment Complexes), that AEP Ohio establish master-metered service at the Apartment Complexes, which AEP Ohio asserts would amount to NEP taking over electric distribution service to the affected tenants. AEP Ohio alleges that NEP intends to purchase electric service from AEP Ohio at wholesale-like master-metered rates and then resell electric service to the individual Apartment Complex tenants at a considerable markup.

{¶ 3} In the Complaint, AEP Ohio alleges that allowing NEP to begin submetering at the Apartment Complexes would violate numerous statutes and Commission regulations, including the CTA, as NEP would be operating as a public utility. AEP Ohio asserts that while NEP has operated in this capacity for many years, the question of whether third-party submetering companies such as NEP are public utilities is now unsettled following the Supreme Court of Ohio's decision in *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617 (2020) (*Wingo*). In *Wingo*, the Supreme Court of Ohio struck down the "modified Shroyer test," which is the Commission's most recent test for determining whether submetering companies are public utilities under Ohio law. As the complaint in the remanded *Wingo* case before the Commission was subsequently dismissed at the request of the complainant, the Commission has yet to address the proper standard for determining whether submetering companies are acting as public utilities. Based upon the facts presented in the request for master-metered service at the Apartment Complexes, AEP Ohio asks the Commission to take up the jurisdictional inquiry envisioned by the Court in the *Wingo* remand dismissal entry and address whether NEP and other submetering companies are operating as public utilities. AEP Ohio states three counts in its Complaint: (i) Count I – that by "engaging in the business of supplying electricity" to the Apartment Complexes, NEP would be illegally operating as an "electric light company" under R.C. 4905.03 and a "public utility" under R.C. 4905.02; (ii) Count II – by supplying or arranging for the supply of retail electric service

to the Apartment Complexes, NEP would be an "electric supplier" as defined in R.C. 4933.81(A), providing "electric service" as defined in R.C. 4933.81(F), and would be violating the CTA under R.C. 4933.83(A); and (iii) Count III – by supplying or arranging for the supply of a competitive retail electric service to the Apartment Complexes, without the required certification to do so, NEP would be violating R.C. 4928.08(B).

{¶ 4} On October 18, 2021, NEP filed its answer to the Complaint. NEP admits that AEP Ohio is a public utility subject to the Commission's jurisdiction and that AEP Ohio has been granted an exclusive territory to provide electric distribution service under the CTA. NEP admits that it provides certain management services to property owners, managers, and developers pursuant to private contractual agreements. NEP further admits that pursuant to its contractual obligations and as the authorized representative of each property owner, manager, and developer, NEP receives and pays invoices from AEP Ohio's master-metered utility charge on behalf of the respective property owner, manager, and developer. NEP denies, however, that it would be "taking over" service from AEP Ohio if the requested master-metered service were set up at the Apartment Complexes. NEP further denies that it is a public utility under R.C. 4905.02 and, therefore, NEP asserts that it is not subject to the Commission's statutes and rules governing public utilities. NEP's answer also asserts a number of affirmative defenses.

{¶ 5} On October 20, 2021, NEP filed a motion to dismiss the Complaint and a memorandum in support. In the motion to dismiss, NEP asserted three primary bases for dismissal: (1) that the Complaint is not yet ripe; (2) that AEP Ohio failed to state reasonable grounds for the Complaint; and (3) that AEP Ohio failed to name indispensable parties to the case. AEP Ohio filed a memorandum contra NEP's motion to dismiss on November 4, 2021. NEP filed a reply in support of its motion to dismiss on November 12, 2021.

{¶ 6} On October 28, 2021, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene and accompanying memorandum in support. NEP filed a memorandum contra this motion to intervene on November 12, 2021; OCC filed a reply in

support on November 19, 2021. As part of a January 31, 2022 Entry, the attorney examiner denied OCC's motion to intervene.

{¶ 7} On November 24, 2021, NEP filed a motion for protective order or, in the alternative, a stay of discovery. In this motion and supporting memorandum, NEP sought an order precluding NEP's response to the discovery requests issued by OCC until 20 days after the Commission ruled on NEP's motion to dismiss and OCC's opposed motion to intervene. On December 8, 2021, AEP Ohio filed a memorandum contra NEP's motion to the extent that NEP sought to preclude all discovery, including any propounded by AEP Ohio, until after the Commission ruled on NEP's motion to dismiss. OCC filed a memorandum contra the motion on December 9, 2021. On December 15, 2021, NEP filed a reply in support of this motion.

{¶ 8} On December 8, 2021, AEP Ohio filed a notice of additional authority in which it wished to make the Commission aware of a decision which it believes bears directly on this case. In this filing, AEP Ohio attached a Decision Granting Defendant Ohio Power Company, dba AEP Ohio's Motion to Dismiss in which the Franklin County Court of Common Pleas dismissed a civil action that NEP recently brought against AEP Ohio concerning the same dispute at issue in this proceeding. *See Nationwide Energy Partners, LLC v. Ohio Power Co.*, Franklin C.P. No. 21CVH07-7186 (Dec. 3, 2021).

{¶ 9} On December 10, 2021, NEP filed a motion for a stay and request for expedited ruling. NEP argued a stay was warranted because AEP Ohio unilaterally changed its policy to begin denying construction requests at buildings such as the Apartment Complexes. NEP alleged that such requests have been routinely granted for over 20 years but that they were being denied based solely upon NEP being the requesting construction service provider. NEP stated that AEP Ohio implemented this policy without any Commission order that NEP or the property owners are, or will be, violating any law or tariff provision. NEP, therefore, requested that the "status quo" be reestablished and that its conversion requests be completed.

{¶ 10} On December 17, 2021, AEP Ohio filed a memorandum contra NEP's motion for a stay. AEP Ohio responded that the *Wingo* remand reopened the question as to whether NEP is a public utility and operating unlawfully under the CTA and other statutes and regulations. AEP Ohio explained that it intended to continue to provide master-metered service to existing buildings already submetered and to buildings where AEP Ohio was establishing service for the first time. AEP Ohio asserts that a gap in the law was created by *Wingo* such that AEP Ohio believed that the legal status of third-party submetering companies like NEP was unclear and, thus, AEP Ohio felt it appropriate to halt conversions of buildings currently serviced by AEP Ohio until the Commission weighed in. AEP Ohio also found NEP's motion to be procedurally improper and the argument as to the necessity of a stay to be lacking.

{¶ 11} By Entry issued December 28, 2021 (the Stay Entry), the attorney examiner granted NEP's December 10, 2021 motion for a stay. As outlined in the Stay Entry, the attorney examiner found that NEP satisfied the four-factor test adopted by the Commission to determine whether a stay should be granted in a Commission proceeding. The Stay Entry stated that application of the Supreme Court's guidance and its ultimate effect upon submetering companies, public utilities, and Commission-approved tariffs is a determination that can be made only by the Commission. As no such analysis and determination has yet been made by the Commission, the attorney examiner agreed with NEP that it is inappropriate for AEP Ohio to unilaterally alter the interpretation and implementation of its Commission-approved tariffs relating to master-metered service.

{¶ 12} On January 3, 2022, AEP Ohio filed an interlocutory appeal (or, in the alternative, request for certification of interlocutory appeal) of the ruling in the Stay Entry which granted NEP's request for a stay. AEP Ohio asserted that the Stay Entry exceeded the attorney examiner's authority and, therefore, the Commission should consider its interlocutory appeal as of right. Alternatively, AEP Ohio argued that the interlocutory appeal should be certified to the Commission because it raises important and novel questions of law concerning the Commission's authority to grant preliminary relief. As to

the actual appeal, AEP Ohio argued that the Commission should reverse the ruling for five primary reasons outlined therein.

{¶ 13} On January 10, 2022, NEP filed a memorandum contra AEP Ohio's interlocutory appeal (or, in the alternative, request for certification of interlocutory appeal). NEP argued that AEP Ohio's interlocutory appeal and the request for certification should be denied. NEP stated that AEP Ohio is not entitled to an appeal as of right, as the ruling does not satisfy any of the categories listed in Ohio Adm.Code 4901-1-15. NEP further stated that AEP Ohio also failed to raise a new or novel question of law necessitating certification of the interlocutory appeal. In the event that the interlocutory appeal would be certified, NEP presented arguments as to why it believed that nothing AEP Ohio raises in the appeal should alter the ruling in the Stay Entry.

{¶ 14} On January 11, 2022, NEP filed a motion for leave to file an amended answer and counterclaim, instanter. On January 26, 2022, AEP Ohio filed a memorandum contra NEP's motion. On February 2, 2022, NEP filed a reply in support of its motion.

{¶ 15} On January 31, 2022, the attorney examiner issued an Entry that, among other things, denied NEP's motion to dismiss, finding that AEP Ohio stated reasonable grounds for the Commission's consideration of the Complaint.

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

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

{¶ 18} On July 27, 2022, the Commission denied AEP Ohio's February 7, 2022, interlocutory appeal of the Stay Entry. This Entry did, however, clarify that the scope of the granted stay applied only to the five buildings that make up the Apartment Complexes.

{¶ 19} On July 28, 2022, a prehearing conference was held among the parties to attempt to resolve numerous issues arising from an array of filings by both parties relating to discovery disputes and procedural matters. At this prehearing conference, both parties agreed to withdraw motions related to discovery and depositions that were pending at that time.[1]

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

{¶ 21} Between the issuance of the Entry scheduling the hearing and the date on which the hearing commenced, a number of discovery requests and procedural filings were made by both parties. Each of these matters was dealt with either via an attorney examiner entry or by subsequent agreements reached between the parties.

{¶ 22} The evidentiary hearing commenced on October 24, 2022, at the offices of the Commission, with the first phase of the hearing continuing through November 1, 2022. On November 4, 2022, the hearing recommenced via Webex to take a witness' testimony. Then

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

on November 8, 2022, the hearing recommenced via Webex to close the record and set a briefing schedule.

{¶ 23} On December 16, 2022, AEP Ohio and NEP each filed timely initial post-hearing briefs. Both parties filed redacted, public versions of their briefs on the case docket as well as confidential versions filed under seal. Both parties also filed associated motions for protective order related to the confidentially-filed versions of the briefs.

{¶ 24} On January 20, 2023, AEP Ohio and NEP each filed timely reply briefs. Both parties filed redacted, public versions of their reply briefs on the case docket as well as confidential versions filed under seal. Both parties also filed associated motions for protective order related to the confidentially-filed versions of the reply briefs.

III. APPLICABLE LAW

{¶ 25} Several statutory provisions are at issue in this case. R.C. 4905.02(A) provides, in relevant part, that a "public utility" includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in R.C. 4905.03. R.C. 4905.03 defines an "electric light company" as a person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state." Subject to certain exceptions, the above statutes extend the Commission's jurisdiction to entities qualifying as public utilities and electric light companies.

{¶ 26} The Commission has historically applied a three-part test to determine if an entity, engaged in the resale of public utility service, is operating as a public utility and falls within the scope of the Commission's exclusive jurisdiction. The three-part test, first adopted by this Commission in *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al. (*Shroyer*), Opinion and Order (Feb. 27, 1992), and affirmed by the Ohio Supreme

Court in *Pledger v. Pub. Util. Comm. (Pledger)*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, (2006) ¶ 18, (*Shroyer* test) is as follows:

> (a) Has the landlord manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right of way for utility purposes?
>
> (b) Is the utility service available to the general public rather than just to tenants?
>
> (c) Is the provision of utility service ancillary to the landlord's primary business?

{¶ 27} The Commission initially applied the *Shroyer* test to waterworks companies, but it can be applied to the provision of any public utility service. *Shroyer*, Opinion and Order (Feb. 27, 1992); *In re the Complaint of Tobi Pledger v. Capital Properties Management, Ltd.*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004); *Pledger*, at ¶ 18; *In re Complaint of Michael E. Brooks, et al. v. The Toledo Edison Co.*, Case No. 94-1987-EL-CSS (*Brooks*), Opinion and Order (May 8, 1996); *In re the Application of FirstEnergy Corp.*, Case No. 99-1212-EL-ETP, et al., Entry (Nov. 21, 2000); *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, (2002) (*FirstEnergy)* at 10, 18.

{¶ 28} The relevant part of the Certified Territories Act for this case, states that "* * * each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier[.]" R.C. 4933.83(A).

{¶ 29} Further, the relevant part of R.C. 4928.08(B) states that "No electric utility, electric services company, * * * shall provide a competitive retail electric service to a

consumer in this state on or after the starting date of competitive retail electric service without being certified by the public utilities commission * * * [.]" R.C. 4928.08(B).

{¶ 30} R.C. 4905.26 provides the Commission with the authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 31} R.C. 4905.35 prohibits public utilities from making or giving any undue or unreasonable preference or advantage to any person, corporation, or locality, or subjecting the same to any undue or unreasonable prejudice or disadvantage.

{¶ 32} As in all Commission complaint proceedings, the complainant has the burden of proving the allegations of the complaint. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

IV. DISCUSSION

A. Complaint

1. SUMMARY OF THE ARGUMENTS

a. Count I—Whether NEP Acts as an "Electric Light Company" Under R.C. 4905.03(C) and, Thus, a "Public Utility" Under R.C. 4905.02(A)?

i. AEP OHIO'S SUMMARY OF NEP'S BUSINESS MODEL AND ACTIVITIES AT THE APARTMENT COMPLEXES

{¶ 33} AEP Ohio notes that the following properties are the Apartment Complexes at issue in this case:

1. The Gateway Lofts is an apartment complex located at 2211 Dublin Road, Columbus, Ohio 43228; Gateway Lofts has 269

units and electric service is configured with 2 separate metering points. (AEP Ohio Ex. 3 at 18.)

2. Norton Park is an apartment complex located at 4657 E. Broad Street, Whitehall, Ohio 43213; Norton Park has 360 units and electric service is configured with 6 separate metering points. (AEP Ohio Ex. 3 at 18.)

3. The Normandy is an apartment complex located at 315 E. Long Street, Columbus, Ohio 43215; The Normandy has 275 units and electric service is configured with 2 separate metering points. (AEP Ohio Ex. 3 at 18.)

4. Arlington Pointe is an apartment complex located at 2565 Shore Line Lane and 2599 Shore Line Lane, Columbus, Ohio 43221; Arlington Pointe has 112 units and electric service is configured with 2 separate metering points. (AEP Ohio Ex. 3 at 18.)

5. The Edge at Arlington is an apartment complex located at 5020 Dierker Road, Columbus, Ohio 43220; The Edge at Arlington has 155 units and electric service is configured with 8 separate metering points. (AEP Ohio Ex. 3 at 18.)

(AEP Ohio Initial Br. at 41-42.)

ii. NEP INSTALLS, MAINTAINS, AND REPAIRS DISTRIBUTION EQUIPMENT

{¶ 34} AEP Ohio argues that NEP installs "electric distribution equipment" on the property to enable submetering. For example, the Commodity Coordination Service Agreement (CCSA), the main contract between NEP and the property owners that governs NEP's activities, discusses installing "meter equipment." Such equipment includes individual electric meters attached to each tenant unit, Electrical Remote Transmitters

(ERTs), and equipment to receive transmission from ERTs (Meter Equipment) (Ex. G, at G-7 (CCSA 1.1.3), G-39 (Meter Installation Agreement (MIA), Ex. A)). AEP Ohio asserts that NEP installs electric installation equipment other than Meter Equipment at the properties, such as installing weatherheads, conduit, wires, and CT cabinets at Arlington Pointe (Tr. VII at 1222-1223, 1226). Further, at other properties in AEP Ohio's service territory, NEP installs additional equipment, such as transformers, disconnects, secondary cables, and other wiring (Tr. VII at 1270; AEP Ohio Ex. 3 at 21). (AEP Ohio Initial Br. at 51.)

{¶ 35} According to AEP Ohio, the type of equipment that NEP installs depends on the voltage at which AEP Ohio provides service to the property's master meter, with AEP Ohio providing master-meter service at either primary voltage or secondary voltage. The Apartment Complexes all consist of secondary configurations. In secondary configurations, AEP Ohio provides electric service to one or more master meters at secondary voltage (240 volts). Here, AEP Ohio installs and maintains the transformers that convert primary voltage to secondary voltage, and AEP Ohio delivers electricity to the master meter at this lower secondary voltage. After the master meter, AEP Ohio states that NEP installs and maintains all electric distribution equipment necessary to distribute the electricity from the master meter to the individual units' meters, and NEP installs and maintains the individual meters and related meter equipment. (AEP Ohio Ex. 3 at 21.) AEP Ohio contends that NEP's contracts describe what NEP installs in secondary configurations as a "distribution system" (Ex. G at G-39 (MIA, Ex. A)). (AEP Ohio Initial Br. at 52-53.)

{¶ 36} AEP Ohio highlights that, under the CCSA, NEP or its agent is responsible for installing all distribution equipment and must install it "in accordance with good industry practice" (Ex. G at G-7 (CCSA 1.1.3)). Further, AEP Ohio notes that NEP installs the equipment at NEP's sole cost (Ex. G at G-7 (CCSA 1.1.3), G-12 (CCSA 1.7); Tr. VI at 1047; NEP Ex. 90). Ms. Ringenbach, who AEP Ohio asserts is the only witness NEP put forward to discuss its contracts, testified that she did not know what "good industry practice" means (Tr. VI at 1042). Additionally, AEP Ohio notes that NEP and the property owner also executed a separate MIA that governs NEP's installation of distribution equipment at the

property. This agreement for each of the Apartment Complexes, according to AEP Ohio, states that the owner will pay NEP "$0" for the installation of the equipment, and AEP Ohio points out that Ms. Ringenbach does not know why a provision stating that payment would be $0 was included in the contracts. (Ex. G at G-33; Tr. VI at 1051.) Also, AEP Ohio mentions that NEP's MIA provides that NEP must install the distribution equipment in compliance with the National Electric Code or the National Electric Safety Code (NESC) and highlights that AEP Ohio must follow the NESC pursuant to Ohio Adm.Code 4901:1-10-06 (Ex. G at G-35 (MIA, Service Terms § 5)). (AEP Ohio Initial Br. at 53-54.)

{¶ 37} Further AEP Ohio argues that, under its contracts, NEP takes on the responsibility for maintaining and repairing the electric distribution system it installs and performs all maintenance and repairs at its sole expense. For example, the CCSA states that NEP "* * * shall operate and maintain the Meter Equipment at all times in good working order, in accordance with good industry practice." Additionally, NEP is required to "make all necessary repairs and replacements to the Meter Equipment." Also, the CCSA states that "* * * all maintenance, repairs, and replacements to the Meter Equipment shall be provided at Provider's sole cost and expense." (Ex. G at G-7 (CCSA 1.2.1), G-12 (CCSA 1.7); Tr. VI at 1048.) Regarding how quickly NEP must repair malfunctions in its distribution equipment, AEP Ohio asserts that the contracts taken together with Ms. Ringenbach's testimony show that NEP is contractually required to repair distribution equipment "within the standard practices of the utility, which in this case would be AEP Ohio" (Ex. G at G-7 (CCSA 1.2.1), G-8 (CCSA 1.2.3); Tr. VI at 1043-1044). And, AEP Ohio argues that NEP's communications with tenants show that NEP holds itself out to the public as the company responsible for maintaining and repairing "distribution equipment" that distributes electricity to the tenants' homes (AEP Ohio Ex. 1C, Ex. SDL-2C at 1 - CONFIDENTIAL). (AEP Ohio Initial Br. at 55-56.)

{¶ 38} AEP Ohio also points out that NEP changed ownership of the Meter Equipment during the pendency of the complaint proceeding. NEP originally owned the Meter Equipment, where in August and September 2020, NEP and property owners for the

apartment complexes signed the CCSAs, providing that "* * * Provider is the owner and title holder of the Meter Equipment" and that NEP had a right to remove the Meter Equipment from the property when the CCSA expired or was terminated (Ex. G at G-15 (CCSA 5.1)). AEP Ohio argues that an email chain produced by NEP during discovery shows that the Meter Equipment ownership change resulted from this complaint case being filed (AEP Ohio Ex. 4 at 1-3 – CONFIDENTIAL; Tr. VI at 1054-1055 – CONFIDENTIAL). AEP Ohio asserts that NEP and the landlords of the Apartment Complexes executed an amendment and supplement to the MIA and CCSA (Amendment and Supplement) in January and March of 2022 (Ex. G at G-42, 84, 128, 172, 217). Under the Amendment and Supplement, the landlord became the owner of the Meter Equipment, and NEP was no longer entitled to remove the Meter Equipment at the expiration or termination of the agreement (NEP Ex. 90, Ex. G at G-42 (Amendment and Supplement at 1.A)). However, according to AEP Ohio, under the Amendment and Supplement, NEP would still install, maintain, and repair the Meter Equipment at its sole cost and expense (Ex. G at G-7 (CCSA 1.1.3, 1.2.1)). Also, regarding ownership, AEP Ohio asserts that ownership of other non-meter equipment is unclear, considering NEP's contracts do not expressly address the ownership of non-meter equipment. Ms. Ringenbach, as noted by AEP Ohio, testified that NEP "* * * does not list out all the equipment that NEP installs * * *." (Tr. VI at 1074-1077, 1079, 1083; Tr. VII at 1222-1223, 1226, 1270; AEP Ohio Initial Br. at 56-59.)

iii. NEP PROCURES ELECTRIC SERVICE AS THE MASTER METER

{¶ 39} AEP Ohio states that NEP is contractually responsible, pursuant to Section 1.1.4 of the CCSA, for all aspects of working with AEP Ohio to convert AEP Ohio's individual-meter residential service to master-metered service. AEP Ohio notes that the property owner has no "approval" right over the conversion arrangements NEP makes with AEP Ohio unless the arrangements would have "* * * material impact on this agreement or the provision of utility services to Customer." (Ex. G at G-7 (CCSA 1.1.4).) Further, AEP Ohio submits that NEP is responsible for all costs related to converting to master-meter service, and it must pay either AEP Ohio for any contribution in aid of construction charges

that AEP Ohio assesses under its tariff or, as detailed in the MIA, reimburse the property owner if it has paid such charges (Ex. G at G-7 (CCSA 1.1.4), G-33 (MIA Cover Sheet)). Additionally, Mr. Williams testified that NEP handles all aspects of the conversion process, stating that "NEP is the exclusive counterparty involved in the process of converting the existing AEP Ohio customers to their submetered service * * * Throughout the conversion process, NEP is the sole point of contact for coordination with AEP Ohio employees" (AEP Ohio Ex. 3 at 19-20, 23). (AEP Ohio Initial Br. at 59-61.)

{¶ 40} According to AEP Ohio, NEP may unilaterally choose for AEP Ohio to provide generation service to the master meter under AEP Ohio's standard service offer, or NEP may enter a contract with a competitive retail electric service (CRES) provider to secure generation service for the master meter. Also, the CCSA provides that NEP may choose a CRES provider that is affiliated with NEP. AEP Ohio states that, notably, the property owner waives discretion over the choice of a CRES provider. (Ex. G at G-8-9 (CCSA 1.3.1-1.3.3); Tr. VI at 1045.) Further, the CCSA states that the property owner will "take title" to the electricity delivered to the master meter, but, according to AEP Ohio, no record evidence suggests what practical effect the concept of "taking title" has to the provision of electric service to tenants (Ex. G at G-9 (CCSA 1.3.4)). Regarding payment to either AEP Ohio or the CRES provider, AEP Ohio asserts that the CCSA requires NEP to pay all bills for electric service to the master meter. AEP Ohio notes that Section 1.3.5 of the CCSA states that the property owner must pay the bills, but then the second sentence negates the first sentence, providing that NEP must pay all master-meter service bills "notwithstanding" the first sentence. Finally, AEP Ohio points out that NEP promises to hold the property owner harmless against failure to pay electric service bills. (Ex. G at G-9 (CCSA 1.3.5); AEP Ohio Initial Br. at 61-63.)

iv. NEP BILLS TENANTS FOR ELECTRIC SERVICE

{¶ 41} AEP Ohio next asserts that NEP bills tenants for electric service. First, the CCSA requires that NEP reads tenants' meters on a regular basis and that it reads meters

for any "other metered facility (such as clubhouse or other common areas) at the Community" (Ex. G at G-9 (CCSA 1.4.1)). AEP Ohio states that the CCSA requires that tenants' bills have two components: charges for tenants' usage at their individual units and a charge for common area usage. The "Unit Rate charged for Unit Consumption" (Unit Rate) is supposed to be the same or lower than what AEP Ohio would charge tenants for the same level of usage if the tenants were customers of AEP Ohio (Ex. G at G-9-10 (CCSA 1.4.3)). The "Unit Rate charged for Common Area Consumption" (CAU Rate Surcharge) is supposed to be the same or lower than what AEP Ohio would charge a commercial customer for the same level of usage, and NEP calculates the CAU Rate Surcharge in such a way that effectively spreads the common area charges equally among all tenants of a community. AEP Ohio states that NEP must conduct a reconciliation of the common area charges "on at least an annual basis" and that tenants will pay for any shortage, or benefit from any overage, through an increase or decrease to future CAU Rate Surcharges. (Ex. G at G-10 (CCSA 1.4.5); AEP Ohio Initial Br. at 64-66.)

{¶ 42} The CCSA also requires that NEP send tenants monthly electric bills and that such bills must be "prepared and charged in accordance with applicable laws, rules, and regulations," though, according to AEP Ohio, Ms. Ringenbach does not know what specific "applicable laws, rules, and regulations" are being referred to in this section. AEP Ohio asserts that NEP has wide discretion over the format of the bill and that the example bill attached to the CCSA is strikingly similar to AEP Ohio's bills. AEP Ohio notes that NEP denies copying AEP Ohio's bill format but acknowledges that the bill format mimicked utility bill formats in existence in 2016, such as Direct Energy's "bill of the future in 2015." (NEP Ex. 90 at 19-20, Ex. G at G-9 (CCSA 1.4.2), G-24-26 (CCSA Ex. D); AEP Ohio Ex. 1 at 63-64; AEP Ohio Initial Br. at 66-67.)

v. NEP COLLECTS ON PAST-DUE BILLS

{¶ 43} AEP Ohio argues that Ohio landlord-tenant law requires a landlord to pay five percent interest on any security deposit it collects from a tenant. R.C. 5321.16(A). The

CCSA, according to AEP Ohio, states that NEP may charge tenants a $200 security deposit in certain circumstances. AEP Ohio notes that NEP claims it no longer collects security deposits from tenants. Ms. Ringenbach does not know why NEP stopped collecting security deposits and does not know if it paidinterest on the deposits or not, though AEP Ohio notes that an NEP internal document shows a policy existed regarding payment of interest on security deposits. (Ex. G at G-11 (CCSA 1.4.7); Tr. VI at 1085-1086; AEP Ohio Ex. 6 at 36 (NEP003663)-CONFIDENTIAL; AEP Ohio Initial Br. at 68.)

{¶ 44} According to AEP Ohio, the CCSA also provides that NEP may offer payment plans to tenants who are having trouble paying their NEP electric bills, though the payment plans available are the "then current payment options of the Provider," meaning NEP has complete discretion about what kind of payment plans to provide (Ex. G at G-11 (CCSA 1.4.6)). Though the parties agreed to deem details of NEP's payment plans confidential, AEP Ohio notes that the payment plans offered by NEP are not as generous as the plans required by Commission rules (AEP Ohio Ex. 1C at 72, Ex. SDL-4C-CONFIDENTIAL). Further, AEP Ohio asserts that Ms. Ringenbach acknowledged that NEP does not offer any programs or assistance based on income level (Tr. VI at 1109-1110). (AEP Ohio Initial Br. at 68-70.)

{¶ 45} AEP Ohio next argues that, if a tenant fails to pay NEP's electric bill or enter into a payment plan, then the CCSA provides that NEP may disconnect electric service to the tenant's unit at the direction of the landlord (Ex. G at G-11 (CCSA 1.5)). AEP Ohio submits that Ms. Ringenbach did not know what "applicable law" is being referred to in this section of the CCSA (Tr. VI at 1095). (AEP Ohio Initial Br. at 71.)

{¶ 46} AEP Ohio also points out that, in 2021 NEP exercised its power to disconnect electric service to tenants frequently (AEP Ohio Ex. 1C at 78, Ex. SDL-5C-6C – CONFIDENTIAL). Further, AEP Ohio argues that, although the CCSA states that NEP may disconnect tenants at the direction of the property owner, the record shows that a property owner's involvement in NEP's disconnection procedures is often minimal. Ms. Ringenbach

testified that if the landlord does not do "* * * anything, then it's assumed that disconnection moves forward" (Tr. VI at 1096). Also, AEP Ohio points to several documents detailing NEP's internal disconnection procedures, which indicate that NEP only rarely, if ever, obtains any direction from the property owners before disconnecting a tenant (AEP Ohio Ex. 1C at 85-86, Ex. SDL-9C, 12C, 13C – CONFIDENTIAL). AEP Ohio states that NEP claims to be acting on behalf of the landlord when it disconnects electric service for nonpayment, and, under Section 4.4.1 of the CCSA, the amount that NEP bills tenants for electric usage is purportedly part of the rent that the tenant is required to pay for the tenant's unit (Ex. G at G-11 (CCSA 1.5); G-14 (CCSA 4.4.1)). According to AEP Ohio, Ms. Ringenbach testified that NEP would be disconnecting for failure to pay rent; however, she does not know whether it is lawful for a landlord's agent to disconnect utility service for failure to pay rent (Tr. VI at 1101-1102). Citing to R.C. 5321.15, AEP Ohio contends that Ohio landlord-tenant law generally prohibits landlords from disconnecting utility service for failure to pay rent:

> No landlord of residential premises shall initiate any act, including termination of utilities or services, exclusion from the premises, or threat of any unlawful act, against a tenant, or a tenant whose right to possession has terminated, for the purpose of recovering possession of residential premises, other than as provided in Chapters 1923., 5303., and 5321. of the Revised Code.

R.C. 5321.15(A). (AEP Ohio Initial Br. at 71-73.)

{¶ 47} NEP's disconnection procedures, according to AEP Ohio, comply with some of the Commission rules related to disconnections by public utilities, but NEP does not follow others. In its brief, AEP Ohio provides a table detailing the Commission rules NEP does and does not follow. AEP Ohio states that NEP follows several rules related to notice, such as timing of when the notice is sent (Ohio Adm.Code 4901:1-18-06(A)), the amount due (Ohio Adm.Code 4901:1-18-06(A)(5)(a)), contact information (Ohio Adm.Code 4901:1-18-06(A)(5)(c)), the availability of payment agents (Ohio Adm.Code 4901:1-18-06(A)(5)(i)), and

extra timing for sending notice during the winter (Ohio Adm.Code 4901:1-18-06(B)(1)). According to AEP Ohio, NEP fails to follow more rules than it does follow, for example, NEP does not properly follow rules that require a public utility to wait two months after a bill is sent before disconnecting service, providing publicly available disconnection procedures by way of a tariff (Ohio Adm.Code 4901:1-18-06(I)), a public utility response to a Staff inquiry (Ohio Adm.Code 4901:1-18-06(H)), a statement about the Commission's complaint procedures (Ohio Adm.Code 4901:1-18-06(A)(5)(d)), notice that includes information about medical certification (Ohio Adm.Code 4901:1-18-06(A)(5)(h)), notice explaining specific payment plans offered (Ohio Adm.Code 4901:1-18-06(A)(5)(g)), providing personal notice on day of disconnection (Ohio Adm.Code 4901:1-18-06(A)(2)), conspicuous notice on day of disconnection (Ohio Adm.Code 4901:1-18-06(A)(2)), and a public utility employee stopping the disconnect for certain reasons (Ohio Adm.Code 4901:1-18-06(A)(4)). (AEP Ohio Ex. 1C at 78-81 – CONFIDENTIAL; AEP Ohio Initial Br. at 73-75.)

{¶ 48} According to AEP Ohio, NEP claims that it offers medical certification as a way to avoid disconnection for nonpayment, though AEP Ohio asserts that an NEP internal document seems to directly conflict with this claim (AEP Ohio Ex. 1C at 81, Ex. SDL-10-CONFIDENTIAL). NEP's medical form states that the certification is "pursuant to Ohio Administrative Code: 4901:1-18-05," though, AEP Ohio points out that Ms. Ringenbach does not know why the form refers to a Commission rule that applies only to public utilities (AEP Ohio Ex. 1, Ex. SDL-10 at 1- CONFIDENTIAL; Tr. VI a 1107). AEP Ohio then lays out how NEP's medical certification fails to adhere to Ohio Adm.Code 4901:1-18-05, noting that the phrasing "or life-threatening" indicates a higher standard than that of "especially dangerous to the health of" standard under Ohio Adm.Code 4901:1-18-06(C)(1)(a); that NEP's certification fails to reference the tenant's need for power to operate medical equipment under Ohio Adm.Code 4901:1-18-06(C)(1)(b); that NEP only allows a physician to certify the form unlike as required under Ohio Adm.Code 4901:1-18-06(C)(2), which allows others, such as a physician assistant, clinical nurse specialist, etc., certify; and NEP does not use the medical certification form posted on the Commission's website, which public utilities must

use under Ohio Adm.Code 4901:1-18-06(C)(3)(a) (AEP Ohio Ex. 1 at 80). (AEP Ohio Initial Br. at 76-77.)

{¶ 49} AEP Ohio also asserts that NEP maintains a customer service center and employs customer service representatives to field customer calls and to address customer concerns about service, billing, and other topics related to the provision of electric service. In its brief, AEP Ohio summarizes NEP's internal documents relating to NEP's customer service employees and their training, which AEP Ohio provides to show the similarities between how AEP Ohio operates and what NEP's customer service employees are trained to handle. (AEP Ohio Ex. 1C at 87-88 – CONFIDENTIAL; AEP Ohio Initial Br. at 77-78.)

vi. NEP PROFITS FROM ELECTRIC SERVICE SALES

{¶ 50} AEP Ohio asserts that NEP's electric bills instruct tenants to remit payment to NEP, not the property owner (Ex. G at G-11 (CCSA 1.5)). AEP Ohio argues that NEP's "Fee for Services" is an arrangement in which NEP incurs all costs to provide electric service to the tenants, and then NEP is allowed to keep all funds it receives from tenants as a result of billing them for electric service. Under the CCSA, NEP's fee is simply its profit, contends AEP Ohio. Under Section 3.1 of the CCSA, NEP's fee is the "positive difference, if any" between NEP's revenues (i.e., revenues collected from provision of electric service to tenants from the Unit Rate and CAU Rate Surcharge) and its costs. Ms. Ringenbach testified that, if NEP's costs exceed its revenues, then NEP's fee is zero. NEP would then suffer a loss, and the property owner would not pay NEP any money. (Ex. G at G-12-13 (CCSA 3.1); Tr. VI at 1116.) AEP Ohio notes that, according to Ms. Ringenbach, NEP's revenues from its electric bills are sufficient to cover its costs because of rate arbitrage, which is the difference between (a) the charges that NEP pays AEP Ohio for master-meter service, which is billed at a commercial rate and (b) the total amount that tenants pay NEP for electric service, which NEP bills at AEP Ohio's residential rate plus the CAU Rate Surcharge. AEP Ohio asserts that, because AEP Ohio's commercial rate is lower than its residential rate, the rate arbitrage

is sufficient for NEP to make a profit. (NEP Ex. 90 at 5, 17, 23, 51; AEP Ohio Ex. 2 at 5-6; AEP Ohio Initial Br. at 79-81.)

{¶ 51} The MIA also includes what AEP Ohio terms as incentive payments from NEP to the property owner, the "Door Fee" and the "Residual Payments." The "Door Fee," or "forward commission," as the MIA calls it, is an upfront payment that NEP makes to the property owner as, in AEP Ohio's perspective, an inducement to sign the contract (Door Fee). AEP Ohio notes that Ms. Ringenbach did not know why the Door Fee is called a forward commission and did not know how it was calculated. The Door Fees for the Apartment Complexes are as follows: Arlington Pointe is $22,000; Gateway Lofts is $53,800; Normandy is $53,600; Lofts at Norton Crossing is $72,000; Edge at Arlington is $45,600. (Ex. G at G-33, 76, 119, 163, 208; Tr. VI at 1115.) AEP Ohio highlights that the original MIA, signed in August and September 2020, provided that the Door Fee would be paid in two installments, the first of which occurred upon delivery of the electric meters. In the Amendment to the MIA, signed in October 2020 (Amendment to the MIA), the payment of the first installment was accelerated, such that it was due within 30 days of the last date of an amendment being fully executed. (Ex. G at G-33 (MIA Cover Sheet), G-2 at 1; AEP Ohio Initial Br. at 81-83.)

{¶ 52} The "Residual Payment", AEP Ohio notes, is a "monthly payment of $6.00 per Qualified Unit" that NEP makes to the property owner (Residual Payment), with a "Qualified Unit" effectively being a unit that is currently occupied by a tenant (Ex. G at G-16-17 (CCSA 6.1-6.2). In its initial brief, AEP Ohio calculated the annual residual payment NEP would make to each of the Apartment Complexes if all units were occupied: Arlington Pointe (112 units), $8,064; Gateway Lofts (269 units), $19,368; Normandy (268 units), $19,296; Lofts at Norton Crossing (360 units), $25,920; Edge at Arlington (228 units), $16,416. (AEP Ohio Initial Br. at 83.)

vii. NEP's Factual Summary Regarding Its Operations at the Apartment Complexes

{¶ 53} NEP was founded in 1999 as an in-house energy services company for local real estate developer Lifestyles Communities (LC), as LC was at that time building its own infrastructure and asking the public utility to provide single master-meter service and LC (and other developers) would then take responsibility for paying for utility service and then metering and billing their tenants. Developers used this method to create an asset, owned by its own community, which paid for itself through rate arbitrage. Since that time, NEP has grown to provide additional energy technology solutions for property owners – these products and services include energy control and advisory services, energy construction and design solutions, electric vehicle charging, equipment financing, utility rates and tariff monitoring and support, tenant billing, and other energy related services. NEP states that its customers hire NEP to manage these systems for them, just as they commonly hire outside companies to manage leasing, rent collection, maintenance, and landscaping. Thus, NEP enters into a contractual agreement with a landlord/property owner to act as the landlord's agent. According to NEP, it simply stands in its customer's shoes to provide a turnkey solution to navigate a complex field. (NEP Initial Br. at 14-15.)

{¶ 54} NEP states that the contracts between the owners of the Apartment Complexes and NEP control the relationship between those entities. In August/September of 2020, NEP and the various property owners entered their respective CCSAs, Addenda to CCSA, and MIAs. (NEP Ex. G.) The Amendment to MIA was executed between the contract parties for each of the five apartment complexes in October of 2020. The further Amendment and Supplement to MIA and CCSA was executed in the Spring of 2022. Collectively, these contracts are the applicable terms and conditions for the five Apartment Complexes, and for purposes of the hearing, were compiled into a single Exhibit G. (NEP Initial Br. at 15-16; NEP Ex. G.)

viii. AEP OHIO'S ARGUMENT SUMMARY

{¶ 55} AEP Ohio argues that *Wingo* marked a "sea change" in law governing submetering because it recognized a distinction between two different types of submetering. The first type, according to AEP Ohio, is the original form of submetering, which includes the following key features: (a) the resale was conducted by the landlord, itself; (b) the resale was conducted on the landlord's own property; (c) the landlord was merely recovering its electric costs and sometimes an administrative fee; and (d) the resale of electricity was ancillary to the landlord's principal business of leasing residential or commercial real estate to tenants. The second type, according to AEP Ohio, is the new "third-party," "big business" form of submetering, which consists of the following key features: (a) the resale involved a third-party, not just a landlord; (b) the third-party operated at multiple properties that it does not own; (c) the third-party reseller was generating substantial profit; and (d) submetering is the third-party reseller's primary business. (AEP Ohio Ex. 1 at 14-16.) AEP Ohio emphasizes that the original landlord exception to R.C. 4905.03(C) is not an issue in this case, meaning if the Commission agrees that NEP is a public utility then landlords themselves will not be limited to pass on their electric costs to tenants through submetering in a manner consistent with the original landlord exception. (AEP Ohio Initial Br. at 84-89.)

{¶ 56} AEP Ohio counters NEP's recitation of the history of submetering case law by saying that there are several key misstatements and omissions made in NEP's account. First, AEP Ohio concedes that the core jurisdictional language of R.C. 4905.03(C) has not changed in over a century, but it submits that the business of submetering has radically changed. AEP Ohio repeatedly states that all former cases addressing submetering dealt with the "original" form of submetering, where a landlord itself charged customers for electric service. AEP Ohio points to the *Wingo* decision, where the Supreme Court of Ohio contrasted this original form with submetering with a new "big business" model that involves "third-party resellers such as NEP." AEP Ohio believes that because NEP represents this new "big business" model of submetering, it actually undercuts NEP's

argument since this new business model could be interpreted differently under the century-old statute. (AEP Ohio Reply Br. at 13-14; *Wingo* at ¶ 3.)

{¶ 57} Second, AEP Ohio finds NEP's assertion that it is black letter law that landlords can submeter tenants to be a red herring since NEP is not the landlord. Rather, NEP is, in reference to the *Wingo* decision, a new type of entity to which the statute must be applied. AEP Ohio asserts that whether landlords themselves can submeter tenants is not at issue and AEP Ohio is not challenging the original landlord exception. The question, according to AEP Ohio, is whether NEP is engaged in the business of supplying electricity to consumers as referenced under R.C. 4905.03(C). (AEP Ohio Reply Br. at 14-15.) (Responding to NEP Initial Br. at 8)

{¶ 58} Third, with respect to NEP citing caselaw which held that the landlord in a master-meter submetering configuration is a "consumer," AEP Ohio believes that NEP extends these holdings too far. AEP Ohio submits that *Shopping Centers*, *Brooks*, *FirstEnergy*, and *Pledger* addressed the narrow issue of whether the Commission has jurisdiction over the sale of electric service from the utility to the landlord's master meter, and these cases all found that the landlord is a "consumer" under R.C. 4905.03(C) and that the Commission does have jurisdiction over such a sale. *Shopping Cent'rs Ass'n v. Public Util. Com.*, 3 Ohio St. 2d 1, 1-5, 208 N.E. 2d 923 (1965) (*Shopping Centers*); *Brooks*, Opinion and Order (May 8, 1996); *FirstEnergy*, 775 N.E.2d 485 (2002). However, according to AEP Ohio, none of these cases addressed whether tenants in a master-meter submetering configuration are also "consumers" under the meaning of the statute when considering this "new form" of submetering. AEP Ohio argues that the question of whether a tenant is also a "consumer" in the submetering context was not at issue in those cases and not analyzed by the Court. AEP Ohio argues that the plain meaning of the word forces a conclusion that tenants in this situation are "consumers." (AEP Ohio Reply Br. at 14-16.)

{¶ 59} To answer the question of whether NEP is "engaged in the business of supplying electricity * * * to consumers" under R.C. 4905.03(C), AEP Ohio asserts that the

Commission should follow the principles of "substance over form" and "follow the money." Substance over form, according to AEP Ohio, means focusing on the substance of NEP's activities rather than NEP's self-serving labels and descriptions. AEP Ohio believes this principle is grounded in statute, noting that since "engaged" and "supplying" are active verbs, the Commission should look at what NEP is actually doing, not NEP's labels for such activities. Further, the phrase "in the business of" directs the Commission to examine the totality of NEP's business model. Finally, AEP Ohio argues that the follow the money principle holds that if the Commission wants to really understand the nature of the business that NEP is engaged in, it should track how money flows between the property owner, tenants, and NEP. (AEP Ohio Ex. 1 at 9-10; AEP Ohio Initial Br. 89-90.) When using these principles to examine NEP's business activities, it is evident to AEP Ohio that the landlord does virtually nothing related to providing electric service at the Apartment Complexes. AEP Ohio supports this claim by reproducing a chart of NEP's activities which it also included on pages 112-113 of its initial brief. AEP Ohio asserts that this list of activities prove that NEP is responsible for providing electric service to the tenants and that the landlord is not doing so. (AEP Ohio Reply Br. at 16-18.) A more detailed explanation of these activities is provided below.

{¶ 60} AEP Ohio argues that the first way NEP is "engaged in the business of supplying electricity to consumers" under R.C. 4905.03(C) is that NEP installs, maintains, and repairs all electric distribution equipment necessary to distribute the electricity from the master meter to the individual units' meters, and NEP installs, maintains, and repairs the individual meters and related meter equipment (AEP Ohio Ex. 3 at 21). According to Mr. Williams and Mr. Lesser, as AEP Ohio moves its equipment out, NEP moves in and installs its own equipment and takes over the same functions of supplying electricity to consumers. AEP Ohio argues that installing meters and other equipment to serve end-use customers is a regular and necessary component of being "engaged in the business of supplying electricity * * * to consumers in the state." (AEP Ohio Ex. 1 at 46; AEP Ohio Ex. 3 at 21.) According to AEP Ohio, much of the equipment NEP installs is not the type of wiring

installed by electricians for home or business electric systems, but rather is electric distribution equipment typically installed by utilities, which is why the MIA requires that NEP comply with the National Electric Code or NESC, the same standard AEP Ohio must follow under Ohio Adm.Code 4901:1-10-06 (Ex. G at G-35 (MIA, Service Terms § 5)). Further, NEP's own contracts and internal documents refer to the equipment it is responsible for as electric distribution equipment (Ex. G at G-39 (MIA, Ex. A); AEP Ohio Ex. 1C at 45 - CONFIDENTIAL; Tr. VI at 1072). Moreover, AEP Ohio asserts that the CCSA's standards for how quickly NEP must repair equipment malfunctions expressly references AEP Ohio standards, a stark admission that NEP is fulfilling the same role as AEP Ohio at the properties (Ex. G at G-8 (CCSA 1.2.3); Tr. VI at 1044). Finally, under the "follow the money" principle, NEP must perform these duties at its "sole cost and expense," with NEP recovering its costs through bills to tenants. According to AEP Ohio, the above framework is how independent, third-party electric service providers recover their costs, through charges for electric service. (Ex. G at G-7 (CCSA 1.2.1); AEP Ohio Ex. 1 at 48, Ex. SDL-1; AEP Ohio Initial Br. at 91-95.)

{¶ 61} AEP Ohio contends that the record shows that NEP is acting as an independent, third-party that is "engaged in the business of supplying electricity" when it procures electric service at the master meter for resale, and, therefore, NEP does not qualify for the original landlord exception to R.C. 4905.03(C). AEP Ohio analogizes that, just as AEP Ohio must connect to the larger electric grid to ensure a steady supply of electricity to serve its customers, NEP connects to the lager electric grid by arranging for AEP Ohio or a CRES provider to provide service to the property's master meter (AEP Ohio. Ex. 1 at 46). NEP handles all aspects of the conversion from individual-meter service to master-meter service, with Mr. Williams noting that NEP is the exclusive counterparty involved in the process of converting the existing AEP Ohio customers to their submetered service and that NEP is the sole point of contact for coordination with AEP Ohio employees (AEP Ohio Ex. 1 at 47; AEP Ohio Ex. at 23). AEP Ohio submits that, once conversion is complete, NEP, not the landlord, has complete discretion to contract with a CRES provider for supply to the master meter,

discretion the landlord waives right to in the CCSA. AEP Ohio asserts that the above is akin to a public utility entering into a wholesale power purchase agreement or participating in the PJM energy capacity markets. (Ex. G at G-8-9 (CCSA 1.3.1, 1.3.3).) According to AEP Ohio, the "follow the money" principle shows that NEP is an independent, third-party electric service provider since the CCSA requires that NEP, not the property owner, must pay AEP Ohio's and the CRES provider's bills and that NEP recovers the costs incurred by paying these bills from billing tenants for electric service (Ex. G at G-9 (CCSA 1.3.5); AEP Ohio Ex. 1 at 52). Just as public utilities arrange and pay for wholesale supply of electricity to service their customers so too, AEP Ohio argues, does NEP arrange and pay for master-meter service to serve tenants. Furthermore, just as public utilities recover their wholesale interconnection and supply costs through customer rates, NEP recovers its master-meter costs through billing tenants. (AEP Ohio Initial Br. at 95-97.)

{¶ 62} AEP Ohio next argues that NEP continues to "engage in the business of supplying electricity" through the meter reading and billing process, first noting that NEP is exclusively responsible for reading tenants' meters, keeping records of tenants' electric usage, and billing tenants for the Unit Rate and the CAU Rate Surcharge (Ex. G at G-9 (CCSA 1.4.1)). Furthermore, AEP Ohio contends that NEP has complete discretion over the format of its bills, which were modeled after other public utilities' bills such as Direct Energy and Exelon (Ex. G at G-9 (CCSA 1.4.2); NEP Ex. 90 at 19-20). In its initial brief, AEP Ohio proceeds to highlight different portions of NEP's electric bill that show NEP impersonates a public utility. Similarly, AEP Ohio examines how the bills show that NEP is acting as an independent, third-party from the landlord by parsing through the following elements of the bill: NEP places its own logo on the bill; checks are payable to NEP; NEP offers its contact information for tenant questions; the Autopay section refers to NEP's bill and not the landlord's bill; the Electronic Bill Pay section only refers to NEP; the Online Payment section only refers to NEP; and tenants only have electric service account numbers through an NEP account and not the landlord. AEP Ohio acknowledges that NEP's bill does provide the following statement: "NEP provides metering billing services on behalf of your community

owner or community associations." However, AEP Ohio contends that this language is buried in the "Fees" section, which tenants are unlikely to read, and that such a disclaimer was simply stuck in the bill at this location as a form-over-substance, counter-factual attempt to advance NEP's narrative that NEP is merely acting as the landlord's agent. According to Mr. Lesser, looking at each element of the bill alone may not be dispositive, but, taken together, they show that, despite NEP's formalistic disclaimer, NEP is acting as an independent, third-party electric service provider doing all activities that a public utility does. (AEP Ohio Ex. 1 at 64-70, Ex. SDL-3; AEP Ohio Initial Br. at 98-102; AEP Ohio Reply Br. at 29.)

{¶ 63} According to AEP Ohio, past-due tenant bill collection activities demonstrate that NEP is "engaged in the business of supplying electricity" just like public utilities and is an independent, third-party supplier of electric service, rendering NEP ineligible for the original landlord exception under R.C. 4905.03(C). Similar to AEP Ohio, NEP offers tenants payment plans if they have trouble paying their electric bills. AEP Ohio asserts that Ms. Ringenbach acknowledged that NEP does not offer any programs or assistance based on income level (Tr. VI at 1109-10). According to AEP Ohio, the only difference between AEP Ohio's provision of payment plans to customers and NEP's is that NEP's payment plans are less generous than the payment plans AEP Ohio must offer under Commission rules (AEP Ohio Ex. 1C at 72, Ex. SDL-4C-CONFIDENTIAL). AEP Ohio argues that, although the CCSA states that NEP may offer payment plans "on behalf of" the landlord, the CCSA also provides that NEP has sole discretion over what payment plans will be offered, which, taking substance-over-form, shows that NEP is acting as an independent, third-party electric service provider. (AEP Ohio Ex. 1 at 74, 76, Ex. SDL-1 (CCSA 1.4.6).) Further supporting this conclusion, AEP Ohio argues that, when "following the money," NEP, not the landlord, has sole authority to set payment plans because only NEP is affected by whether customers pay their bills, and its plans are designed to collect the most money from struggling customers instead of helping these customers with more generous payment plans (AEP Ohio Ex. 1 at 76-77). (AEP Ohio Initial Br. at 102-104.)

{¶ 64} AEP Ohio argues that, if a tenant fails to pay an NEP electric bill or does not enter into a payment plan, NEP engages in the public utility activity of disconnecting a tenant's electric service, which it does so frequently (AEP Ohio Ex. 1C at 78, SDL-5C, SDL-6C – CONFIDENTIAL). According to AEP Ohio, NEP's approach to disconnection is a microcosm of its entire business model and its approach to all utility activities. NEP is engaging in a highly regulated utility-specific activity, disconnection for nonpayment, while not being subject to the detailed statutes and regulations that the General Assembly and Commission applied to that activity. For example, as already detailed above, the Commission rules that NEP follows regarding disconnection primarily relate to telling the customer that the customer owes money and that the bill must be paid to avoid disconnection. Further, NEP does not follow Commission rules that are designed to protect customers and to limit disconnection in certain circumstances. By following some Commission rules, NEP realizes that it is engaging in this highly protected and sensitive activity yet does so to give the impression that it is a legitimate entity akin to AEP Ohio while not having to follow the Commission rules that may hinder its ability to collect delinquent funds in certain circumstances. Regarding the "follow the money" principle, AEP Ohio argues that, because NEP keeps the amounts it collects from the tenants' bills and does not remit those amounts to the landlord, NEP controls the disconnection process as a potent tool to encourage customers to pay. (AEP Ohio Ex. 1 at 82-84; AEP Ohio Ex. 1C at 86-87 - CONFIDENTIAL; AEP Ohio Initial Br. at 104-106.)

{¶ 65} AEP Ohio also argues that another way NEP is "engaged in the business of supplying electricity * * * to consumers" is by maintaining a customer service center and handling complaints and disputes by tenants. As already detailed above, NEP's customer service representatives address the same kinds of customer service issues that public utilities address, such as issues related to outages, security deposits, refunds, estimated meter readings, how rates are calculated, complaints about high bills, payment processing, and disconnections. (AEP Ohio Ex. 1 at 88-89; AEP Ohio Initial Br. at 107.) In NEP's own customer service documents, it makes statements to tenants that are similar to those that

would come from AEP Ohio or any other electric distribution utility. According to AEP Ohio, statements such as those prove that NEP views itself as being in the business of supplying electricity to consumers. (AEP Ohio Reply Br. at 28; AEP Ohio Ex. 1C at Ex. SDL-26C; AEP Ohio Ex. 1C at Ex. SDL-2C; AEP Ohio Ex. 1C at 45 - CONFIDENTIAL.)

{¶ 66} AEP Ohio next asserts that NEP's fee under the CCSA, the positive difference, if any, between its revenues garnered from tenant's payments for electric usage and its costs incurred for its services provided at the properties, is the "ultimate expression" of the "follow the money" principle. According to AEP Ohio, all other public utilities, like itself, incur costs to supply electric service to their customers, and then other public utilities recover their costs and make a profit by billing customers for this electric service. Comparatively, NEP functions the same way. NEP incurs costs to serve tenants and then recovers its costs and makes a profit by billing tenants for electric service. AEP Ohio points out that the rate arbitrage NEP employs by paying AEP Ohio the lower commercial rate versus receiving payment of the higher residential rate results in an enough profit for NEP to pay the landlord a one-time Door Fee and ongoing residual payments. Such inducement by NEP, according to AEP Ohio, conclusively demonstrates that NEP is operating as an independent, third-party electric service provider. (NEP Ex. 90, Ex. G at G-12-13 (CCSA 3.1); AEP Ohio Ex. 1 at 48-49; AEP Ohio Initial Br. at 108-109.)

{¶ 67} AEP Ohio asserts that one of the main formalisms NEP relies on is that it is acting as the agent of the landlord at the properties. Since the landlord is exempt from qualifying as a public utility under R.C. 4905.03(C), then, as the landlord's agent, NEP is exempt as well from qualifying as a public utility. AEP Ohio argues that NEP's position is incorrect for several reasons. First, AEP Ohio argues that original landlord tenant exception to R.C. 4905.03(C) does not automatically apply to any agents of the landlord. While NEP believes that special legal privileges and immunities of the principal apply to the agent, AEP Ohio contends that NEP has provided no authority for this claim. Further, AEP Ohio states that numerous counter examples undermine this claim. For example, AEP Ohio argues that a licensed attorney who hires an agent who is not an attorney cannot simply appear in court

or practice law because the person is the agent of the attorney. (AEP Ohio Initial Br. at 109-111.) AEP Ohio also refers to other examples such as licensed doctors, nurses, entities receiving tax abatements, gambling companies, and others. AEP Ohio avers that NEP must be evaluated on its own to allow the Commission to decide if it is engaged in the business of supplying electricity to consumers. (AEP Ohio Reply Br. at 34-36.)

{¶ 68} Second, NEP's claim that it is acting on behalf of the landlord is contradicted by the record, noting that the "turnkey solution" NEP purportedly claims to provide to landlords means that NEP handles nearly everything with respect to providing electric service to tenants. As already detailed above, AEP Ohio argues that the following activities show how NEP acts as an independent, third-party electric service provider: installing, maintaining, and repairing equipment at the properties; converting property to master-meter service; arranging for a CRES provider; paying for service from AEP Ohio and a CRES provider; reading meters; setting rates; sending bills; offering payment plans; disconnecting for nonpayment; and handling customer questions and disputes. (AEP Ohio Initial Br. at 111-113.)

{¶ 69} Third, AEP Ohio argues that there are two circumstances in which NEP does not follow Ohio landlord-tenant law, thus proving that NEP is not acting as an agent of the landlord. AEP Ohio states that it is axiomatic that an agent's actions are attributable to its principal and that a landlord cannot hire an agent to do what a landlord itself cannot do under the law. First, according to AEP Ohio, NEP does not follow landlord-tenant law concerning interest on security deposits. As already discussed above, the CCSA provides NEP authority to charge a security deposit up to $200 in certain circumstances, and, although it claims it has stopped collecting security deposits, it could resume collecting them at any time under the CCSA. Under R.C. 5321.16(A), a landlord must pay, according to AEP Ohio, five percent on security deposits. Thus, NEP should pay five percent on the security deposits it collects so long as the tenant lives in the apartment for six months or more. According to internal NEP documents, AEP Ohio states that NEP did not appropriately follow the law. AEP Ohio argues that this evidence demonstrates conclusively that NEP

does not, in substance, consider itself an agent of the landlord since it does not follow landlord-tenant law concerning interest payments. Second, AEP Ohio points out that, under R.C. 5321.15(A), Ohio law generally prohibits landlords from disconnecting utilities. Consequently, according to AEP Ohio, when NEP is disconnecting for nonpayment, it cannot be acting as an agent of the landlord, otherwise it would be violating R.C. 5321.15(A). (AEP Ohio Ex. 6 at 36 (NEP003663) - CONFIDENTIAL; AEP Ohio Ex. 1 at 78, Ex. SDL-5C, SDL-6C; Tr. VI at 1091-1092 – CONFIDENTIAL; AEP Ohio Initial Br. at 113-115; AEP Ohio Reply Br. at 37-38.)

{¶ 70} Further regarding this third point, AEP Ohio argues that by finding NEP to be operating as a public utility, the Commission would not be regulating the landlord-tenant relationship, but rather the sale of electricity by a for-profit entity to a consumer, which is unquestionably within the jurisdiction of the Commission. AEP Ohio points out that it was a public utility and subject to the Commission's jurisdiction when it served the tenants at the Apartment Complexes and this status did not encroach on the landlord-tenant relationship governed by R.C. 5321. (AEP Ohio Reply Br. at 37.)

{¶ 71} AEP Ohio contends that the other main formalism that NEP relies on is that the landlord owns the distribution infrastructure at the Apartment Complexes; however, as already detailed above, the landlord's purported ownership has no practical effect since NEP handles everything of substance related to the distribution equipment at the property, such as installing, maintaining, and repairing the equipment at its sole cost. AEP Ohio notes that NEP holds insurance on the equipment as well. (Ex. G at G-7-8 (CCSA 1.1.3, 1.2.3.) AEP Ohio believes the landlord's ownership of distribution equipment is also questionable as a factual matter. As already detailed above, NEP owned the Meter Equipment under the CCSA but, after the Complaint was filed, NEP executed an Amendment and Supplement that purportedly transferred ownership of the Meter Equipment to the property owners (Ex. G at G-42, 84, 128, 172, 217). Pointing to the email exchange produced by NEP during discovery which implied an impetus for the Meter Equipment ownership change, AEP Ohio argues that shifting assets on paper should not be a valid means to escape the Commission's

jurisdiction, especially considering nothing related to NEP's obligations at the property changed (AEP Ohio Ex. 4 – CONFIDENTIAL). As further support for its formalism argument, AEP Ohio also points out that the property owners appear to have paid nothing for the Meter Equipment, casting doubt on whether adequate consideration was given for a valid ownership exchange, and that NEP's contracts do not bother to address ownership of non-meter equipment, showing how inconsequential ownership is to NEP's business model. Finally, AEP Ohio states that NEP's own witness, Mr. Centolella, proclaimed that, all things being considered, changing the equipment's ownership does not change his opinion on the matter in general, and Ms. Ringenbach stated that she could not find applicable law holding that meter ownership was a determining factor in whether a company is engaged in the business of supplying electricity (Tr. V at 918; Tr. VI at 1062). (AEP Ohio Initial Br. at 116-118.)

{¶ 72} In response to NEP's arguments on this point, AEP Ohio states that NEP fails to explain what it actually means for a landlord to "take delivery of and title to the power" directly to the properties. AEP Ohio believes that NEP offers no explanation because there is no explanation, as the concept of "taking title" in this context is a meaningless formalism. AEP Ohio asserts that NEP cites no legal authority suggesting that ownership of equipment is even relevant to whether an entity is an electric light company. In response to NEP's statement that all equipment remains with the owners of a property upon expiration of the contract with NEP, AEP Ohio answers that this has nothing to do with whether NEP is acting as a public utility during the term of the contract. Further, AEP Ohio asserts that the concept of "taking title" is irrelevant because it is possible to qualify as an "electric light company" under R.C. 4905.03(C) without ever taking title to electricity. For example, AEP Ohio points out that when a customer obtains electric generation supply from a CRES provider, it is the CRES provider who has title to the power and the electric distribution company (such as AEP Ohio) never takes title to that power. Thus, a utility exclusively providing electric distribution service is "engaged in the business of supplying electricity,"

and is an "electric light company," even though it never takes title to power in that situation. (AEP Ohio Reply Br. at 20-24.)

{¶ 73} Also, AEP Ohio responds that the account names being in the name of the property owner is not determinative as to whether NEP is operating as a public utility. Rather, AEP Ohio asserts that the account name or "customer of record" is simply the name that a customer provides to an AEP Ohio customer service representative when calling the company to establish service. AEP Ohio states that for properties set up for master-meter service, they have previously been set up in both NEP's name and in a landlord's name, depending on what was requested—demonstrating that the account name is inconsequential for determining whether NEP is operating as a public utility. What AEP Ohio finds to be consequential, is that NEP has directed AEP Ohio to send the bills for all properties at which NEP operates to NEP's corporate office, regardless of whose name is on the account, and NEP pays those bills. AEP Ohio states that it sends bills for 150 accounts, totaling more than $8.5 million in annual billing, to NEP's corporate headquarters. AEP Ohio asserts that NEP is one of its 10 largest purchasers of electricity. AEP also finds it consequential that NEP, not the landlord, handles all aspects of converting to master-meter service – from conversion requests, to site visits and inspections, to installation. In short, the account name is just another NEP formalism that should be disregarded. (AEP Ohio Reply Br. at 22-23.)

{¶ 74} Regarding the *Shroyer* test, AEP Ohio argues that using this test is unnecessary since application of the plain words of R.C. 4905.03(C) is determinative in finding that NEP is a public utility; however, if applied, the Commission should reach the same conclusion AEP Ohio proffers. AEP Ohio first notes that the *Wingo* decision did not overrule the Commission's clarification in Case No. 15-1594-AU-COI regarding the test, which stated that "* * * failure of any one of the three prongs of the *Shroyer* Test is sufficient to establish that a landlord or other entity is unlawfully operating as a public utility." *In re the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Finding and Order (Dec. 7, 2016) at ¶ 20. Turning to the first prong of the *Shroyer* test, AEP

Ohio asserts that NEP manifests an intent to be a public utility by availing itself of special benefits available to public utilities, such as through its bill design. As already detailed above, NEP has designed its bill such that tenants believe that NEP is just like AEP Ohio or another public utility that residents have received electric bills from in the past (AEP Ohio Ex. 1 at 63-4). Further, NEP fails this first prong because, like public utilities, it disconnects tenants' electricity for nonpayment even though, in AEP Ohio's perspective, doing so is prohibited under R.C. 5321.15(A). (AEP Ohio Initial Br. at 119-120; AEP Ohio Reply Br. at 31-32; AEP Ohio Ex. 1C at 78, Ex. SDL-5C, Ex. SDL-6C - CONFIDENTIAL.)

{¶ 75} Regarding the second prong, AEP Ohio asserts that NEP offers its utility services to the general public, considering NEP has grown to serve hundreds of apartments and condominiums in AEP Ohio's service territory and now serves approximately 1.75 percent of AEP Ohio's entire residential customer base. NEP continues to grow its business and attempts to expand into additional properties such that, according to AEP Ohio, the Commission should conclude that NEP has not limited its service to any discrete group of tenants but as many tenants as possible in its efforts to grow its business. (AEP Ohio Ex. 3 at 7; AEP Ohio Initial Br. at 120.)

{¶ 76} Regarding the third prong, which asks whether the provision of utility service is ancillary to the landlord's primary business, AEP Ohio argues that NEP fails this prong as well. As AEP Ohio contends, NEP is not a landlord and not in the business of renting apartments to tenants (Tr. VI at 1037-1038). Rather, NEP's primary and only business is submetering and, therefore, unquestionably fails the third prong. (AEP Ohio Initial Br. at 120.) AEP Ohio also finds no merit in NEP's argument that since NEP is not supplying electricity the third prong of the test is inapplicable. AEP Ohio surmises that NEP does not fully engage with this prong of *Shroyer* because it would only emphasize that NEP is engaging in the type of "big business, third-party" submetering that is far beyond the original scope contemplated in case law dealing with traditional landlord-tenant submetering arrangements. (AEP Ohio Reply Br. at 33-34.)

{¶ 77} AEP Ohio next contends that the Commission should consider the consumer harm caused by NEP's provision of electric services. According to AEP Ohio, Title 49 must be read as a whole, with the detailed scheme of consumer protections granted by the General Assembly throughout Title 49 informing the Commission's definition of "electric light company" in R.C. 4905.03 and "public utility" in R.C. 4905.02. Mr. Lesser and Mr. Centolella both agree, argues AEP Ohio, that they would bear in mind consumer interest when making a decision at the Commission (AEP Ohio Ex. 1 at 19-20; Tr. V at 879-880). AEP Ohio believes that the application of the definition of "public utility" is not self-executing or unambiguous on its face and, thus, the Commission should examine the statutory rules of construction set forth in R.C. 1.49 for ambiguous statutes, which lists considerations one should consult when determining the intent of the legislature in passing an ambiguous provision. Mr. Lesser testified that, when determining "[t]he object sought to be attained" pursuant to R.C. 1.49(A), it is important to note that the purpose of R.C. 4905.02 and R.C. 4905.03 is to divide all consumers of electricity in Ohio into three exclusive and exhaustive categories: (1) consumers served by nonprofit or cooperative utility providers; (2) consumers served by municipal providers; and (3) consumers served by for-profit providers, which are "public utilities" and subject to Commission jurisdiction. AEP Ohio argues that this statute left no room for a fourth group of consumers which is precisely where NEP falls; therefore, allowing NEP to operate in its current capacity undermines the intent of R.C. 4905.02 and 4905.03. Further, when considering "[t]he consequences of a particular construction" under R.C. 1.49(E), AEP Ohio contends that NEP has failed to demonstrate what benefits its brand of submetering provides to consumers or how its big business promotes regulatory policy or objectives. AEP Ohio believes NEP's submetering undermines many of the fundamental rights and protections the General Assembly and the Commission have provided for customers of for-profit electricity providers. (AEP Ohio Initial Br. at 121-123.)

{¶ 78} Moreover, AEP Ohio asserts that considering the potential impacts of consumers is consistent with *Wingo*. *Wingo* stated that the jurisdictional test could not be based solely on harm to customers because such a test was not based in statute; however,

according to AEP Ohio, so long as the Commission's jurisdictional test is not based on harm, meaning the definition of "public utility" is not solely based on how much or little harm an entity causes, the potential consequences of the construction of the statute must be considered. Additionally, AEP Ohio argues that the Commission must examine harm to consumers because AEP Ohio's claim under the Miller Act, R.C. 4933.81, requires the Commission to determine whether abandonment of AEP Ohio's service to each of the individual Apartment Complexes is reasonable. (AEP Ohio Initial Br. at 123-125.)

{¶ 79} AEP Ohio proceeds to illustrate the harm consumers experience as a result of NEP's submetering business model. According to AEP Ohio, the following harm occurs: there is no Commission oversight of rates and terms under R.C. 4905.22 and 4905.26 as well as tenants being forced to adjudicate disputes through the court system rather than through the Commission's complaint procedures; the opportunity for consumers to shop for electric supply is cut-off; consumer costs is increased through common area charges at the properties; the Percentage Income Payment Plan (PIPP) is not offered and the payment plans that are offered fall below the Commission's minimum standards; protections related to disconnection of service are eliminated or weakened; customer confusion increases; conversions cause a drain on AEP Ohio resources that could be used to invest in the distribution grid. (AEP Ohio Ex. 1 at 22, 42, 59-61, 74-75, 82-85, 89-90; AEP Ohio Ex. 2 at 6; Tr. VI at 1109-1110; AEP Ohio Ex. 3 at 12-14; AEP Ohio Initial Br. at 125-132.)

{¶ 80} Next, AEP Ohio attempts to diminish the credibility of one of NEP's primary expert witnesses, Mr. Centolella. AEP Ohio asserts that Mr. Centolella makes three primary statutory arguments in support of his conclusion that NEP is not a public utility: (1) AEP Ohio's exclusive rights under the CTA, R.C. 4933.81 et seq., to serve load extends only to the master meter and not beyond, (2) a company that only provides services on the customer side of the meter is not eligible to have a certified territory under the CTA and cannot be a public utility, and (3) because NEP does not take title to the electricity consumed by tenants and merely arranges for the supply of electricity to tenants, it is not a public utility under R.C. 4905.03 (NEP Ex. 88 at 13-18). (AEP Ohio Initial Br. at 142-143.)

{¶ 81} AEP Ohio notes that Mr. Centolella believes AEP Ohio's right to serve the tenant load ends when the landlord signs a lease that facilitates master-metered service because the metered point of delivery changes from the tenant's residence to the master meter (Tr. V at 982-85). AEP Ohio points out that "electric load center" under the CTA "* * * means all electric-consuming facilities of any type or character owned, occupied, controlled, or used by a person at a single location, which facilities have been, is, or will be connected to and served at a metered point of delivery and to which electric service has been, is, or will be rendered." R.C. 4933.81(E) (Emphasis added). By defining electric load center as facilities that "have been" connected and including a metered point of delivery where service "has been" rendered, AEP Ohio argues that the CTA is intentionally designed to protect continued service to an electric load once it is served by the electric distribution utility. Post-conversion, the tenants are an electric load center who had been served by AEP Ohio. Therefore, AEP Ohio asserts that Mr. Centolella's conclusion that the CTA's electric load center definition does not protect the tenant's load as being part of AEP Ohio's exclusive territory is misguided. Further, AEP Ohio offers a hypothetical where an apartment complex straddles the border of two electric distribution utilities (EDU) service territories, such that 60 percent of tenants reside in EDU A's side of the boundary and 40 percent in EDU B's territory. AEP Ohio notes that, on Day 1 prior to conversion, EDU A and EDU B can only serve tenants in their respective boundaries; however, post conversion, if a single submetering company planned to serve the entire apartment complex, then AEP Ohio believes CTA violations may occur, especially if the master meter is on EDU B's side of the CTA boundary. Also, AEP Ohio asserts that Mr. Centolella acknowledged that unlawful resale can occur behind the meter such as where one neighbor runs an electrical extension cord out their back door to permanently provide service to a neighbor that pays for the service (Tr. V at 999-1000). (AEP Ohio Initial Br. at 143-145.)

{¶ 82} According to AEP Ohio, Mr. Centolella's statutory interpretation would mean that the Supreme Court of Ohio was mistaken in directing the Commission to apply R.C. 4905.03 on remand. Essentially, because NEP's physical activity supporting the supply

of electricity is behind the meter, then there is no way that NEP is a public utility, a conclusion the Court could have reached on its own without a remand. (AEP Ohio Initial Br. at 145-146.)

{¶ 83} AEP Ohio contends that NEP's reliance on *Pledger* for the proposition that, in a master-meter submetering arrangement, it is the landlord, not the tenant who is the "consumer" for purposes of R.C. 4905.03(C) is both inconsistent with the plain meaning of the statute and flawed. Citing the Merriam Webster's Collegiate Dictionary, AEP Ohio submits that the term "consumer," for purposes of this case, should be viewed in line with everyday parlance – one that utilizes economic goods, or purchases goods for personal use rather than resale. AEP Ohio, therefore, argues that the end-user of electric service must be a "consumer," which in this case means the tenants of the Apartment Complexes. This categorization is even clearer, AEP Ohio argues, in situations such as at the Apartment Complexes, where the tenants were previously served directly by AEP Ohio. When AEP Ohio served the tenants directly, there is no dispute that the tenants were "consumers" under R.C. 4905.03(C). After conversion to master-meter service, AEP Ohio asserts that nothing changed – the tenants are still the parties "consuming" the electricity. AEP Ohio states that this definition of "consumer" fits in with the definition of "electric load center" in the CTA, which reinforces that tenants are consumers. (AEP Ohio Initial Br. at 146-147; AEP Ohio Reply Br. at 24-26.)

{¶ 84} AEP Ohio finds NEP's reliance on *Pledger* misses the mark and reads far more into the holding in that case than was actually decided. AEP Ohio argues that *Pledger* only addressed whether the landlord constitutes a "consumer" under R.C. 4905.03(C) and whether the Commission has jurisdiction over the sale from utility to landlord. AEP Ohio believes, however, that *Pledger* did not address whether tenants in such a submetering situation were also consumers, or whether the Commission had jurisdiction over the sale from the landlord to the tenant. If *Pledger* foreclosed a conclusion that a tenant can also be a consumer, AEP Ohio states that the *Wingo* remand would have been pointless as the Court

could have then simply stated as much and held that neither NEP nor any other entity can ever be a public utility in the context of submetering. (AEP Ohio Reply Br. at 26.)

{¶ 85} AEP Ohio proceeds to argue that Mr. Centolella's conclusion that NEP cannot be a public utility because it does not take title to the electricity consumed by tenants and merely arranges for the supply of electricity to tenants is unavailing and immaterial (NEP Ex. 88 at 16-18). In addition to already demonstrating that the landlord "taking title" to the electricity is an irrelevant formalism, AEP Ohio also again contends that it does not take title to power that it delivers for CRES suppliers and not taking title in this circumstance does not make AEP Ohio any less of a public utility as a result. (AEP Ohio Initial Br. at 148-149.)

ix. NEP'S ARGUMENT SUMMARY

{¶ 86} NEP states that the Commission, after reviewing the character of NEP's business and the contracted services it offers to its customers, cannot find that NEP is acting as a public utility at the Apartment Complexes. First, NEP argues that the services it provides to a landlord on the landlord's side of the utility meter are outside the scope of the CTA and, thus, outside the Commission's jurisdiction. NEP submits that reading R.C. 4905.03(C) and R.C. 4933.81(A) "*in pari materi* [sic]" provides a simple jurisdictional test that supports this conclusion. Second, applying the facts of this case to the language of the statute also proves that NEP is not acting as a public utility. Third, if the Commission were to apply the *Shroyer* test (which NEP argues should not even apply in this case), the Commission should again find that NEP is not operating as a public utility. Fourth, NEP stresses that it simply acts as an agent of a landlord and carries out the same functions that a landlord is permitted to perform. (NEP Initial Br. at 36.)

{¶ 87} NEP submits that the relevant jurisdictional statutes are R.C. 4905.02 and 4905.03(C). NEP states that the definition of an "electric light company" has remained virtually unchanged over the last century. By way of example, NEP points to a prior version

of the statute (then called GC 614-2), which defined an electric light company as a company "'engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state.'" See *Ohio River Power Co. v. Steubenville*, 99 Ohio St. 421, 426 (1919). NEP points out that this language is identical to the core language in the current R.C. 4905.03(C). NEP feels that the consistency in language is important because the Supreme Court of Ohio's and the Commission's decisions relating to electric light companies, starting with the Court's decision in *Jonas v. Swetland* 119 Ohio St. 12, 162 N.E. 45, (1928), all relied on the exact same core language. (NEP Initial Br. at 36-37.)

{¶ 88} In reviewing recent entries on this issue, NEP points to the following Commission language: "[t]he resolution of the question of whether an enterprise is operating as a public utility is decided by an examination of the nature of the business in which it is engaged." *In re Commission's Investigation into Elec. Vehicle Charging Service in the State* (EV Case), Case No. 20-434-EL-COI, Finding and Order (July 1, 2020) at ¶ 7, citing to *Indus. Gas Co. v. Public Utilities Com.*, 135 Ohio St. 408, 21 N.E. 2d 166, paragraph one of the syllabus (1939). NEP also highlights earlier language from the Supreme Court of Ohio and considers it to be a guiding principle for this case: "To constitute a 'public utility', the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state." *Southern Ohio Power Co. v. Public Utilities Com.*, 110 Ohio St. 246, 143 N.E. 700, paragraph two of the syllabus (1924). "[E]ach case must be decided on the facts and circumstances peculiar to it." EV Case at ¶ 7, citing in part *Indus. Gas Co. v. Public Utilities Com.* at 413. (NEP Initial Br. at 37-38.) NEP argues that AEP Ohio downplays this guiding principle because nothing in the record shows or establishes that NEP is holding out its products and services to the general public or that it has accepted a public franchise or called to its aid the police power of the state. NEP asserts that, instead, the record shows that it is the landlords and not NEP that contract with tenants through leases under which the landlords supply electricity to the tenants. (NEP Reply Br. at 7-9.)

{¶ 89} NEP states that, significantly, only when a statute is not self-applying does the Commission turn to alternative jurisdictional tests such as *Shroyer*. In the context of landlord-tenant relationships, the Commission has previously used the *Shroyer* test to determine if an entity is operating as a public utility, but NEP argues that the statute at issue is self-applying as to NEP and the application of the *Shroyer* test is unnecessary. (NEP Initial Br. at 37-38.)

{¶ 90} NEP believes that it is well-settled law in Ohio that the Commission does not have jurisdiction over a landlord that resells electricity to tenants. Further, NEP states that AEP Ohio does not dispute this point. In support, NEP points to the Ohio Supreme Court's decision in *Jonas v. Swetland Co.*, in which the Court held that a landlord was not a public utility because there was no evidence that the realty company "had dedicated its property to the public service" nor had "been willing to sell current to the public." *Jonas v. Swetland Co.*, 119 Ohio St. 12, 16, 162 N.E. 45, 46 (1928). To further clarify the landlord's rights in the context of submetering, NEP says that the Court held that the term "consumer" within the jurisdictional statute includes a landlord regardless of whether the landlord resells the electricity through submetering to tenants and lessees. (NEP Initial Br. at 38-39.)

{¶ 91} NEP believes that a Commission opinion and order in 1996 in a complaint case remains significant in this proceeding. In that case, the Commission stated that its jurisdiction covers the regulation of the utility "and its relationship with its customers, the landlord." Further, the Commission found that its jurisdiction did not "extend beyond the public utility/customer relationship" merely by a public utility wishing to extend that jurisdiction by including such a provision in its tariff. NEP interprets this opinion to state definitively that the landlord is the "consumer" served by a public utility. (NEP Initial Br. at 39 citing *Brooks*, Opinion and Order (May 8, 1996).) NEP states that the Commission reaffirmed its finding in *Brooks*, in once again concluding that newly enacted provisions of Chapter 4928 by Amended Substitute Senate Bill 3 in 1999 did not alter the *Brooks* holding that the landlord was the ultimate consumer, not a tenant (NEP Initial Br. at 39-40; *In re First Energy Corp., et al.*, Case No 99-1212-EL-ETP, et al. (*S.B. 3 Case*), Entry (Jan 18, 2001) at 3).

The Court then affirmed the Commission's decision in *S.B. 3 Case*, by reiterating that the Commission "simply affirmed the right of landlords and tenants to enter into lease agreements that appoint the landlord to secure, resell, and redistribute electric service to its tenants" (NEP Initial Br. at 40; *FirstEnergy*, at ¶ 10).

{¶ 92} NEP believes that further clarity was provided in 2006, when the Court issued its opinion in *Pledger*. In *Pledger*, the appellant argued that under the jurisdictional statute for water companies (4906.03(A)(8)), that in a tenant-landlord relationship, the tenant is the consumer of the waterworks utility, not the landlord. NEP states that the Court rejected this argument and agreed that "[t]he PUCO's position that the landlord is the 'consumer' under R.C. 4905.03(A)(8) is better reasoned and is supported by legal authority. (NEP Initial Br. at 40; *Pledger* at ¶¶ 35-36.) In making this decision, NEP says that the Court relied upon its prior decision on the electric light company jurisdictional statute, and stated that "landlords are consumers of utility service, even though they resell that service to tenants" and, therefore, a landlord is not supplier of water to consumers and cannot be a public utility subject to the jurisdiction of the of the Commission (NEP Initial Br. at 40; *Pledger* at ¶ 37, 39).

{¶ 93} While AEP Ohio believes *FirstEnergy* and *Brooks* have little application here, NEP believes that these cases are dispositive given that the owners of the Apartment Complexes are taking AEP Ohio commercial service via tariff and reselling electricity to their tenants through lease arrangements (NEP Ex. 90 at 3-4). NEP further argues that AEP Ohio's position regarding tenants being consumers would reverse the above precedent and, furthermore, if the Commission agrees with AEP Ohio that NEP is a public utility, then the Commission would be forced to find that a landlord is acting as a public utility when supplying electricity to tenants. (NEP Reply Br. at 13-15.)

{¶ 94} On a related point, NEP argues that AEP Ohio's description "landlord-tenant exception" to R.C. 4905.03(C), which allows landlords to submeter tenants, is an improper characterization. NEP asserts that neither courts nor administrative bodies can

create an exception to statutes. *Logan County Bd. of Elections*, 117 Ohio St.3d 76, 82, 2008-Ohio-333, 881 N.E.2d 1214, ¶ 39, citing *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718, 817 N.E.2d 76, ¶ 25, quoting *State v. Hughes* (1999), 86 Ohio St.3d 424, 427, 1999-Ohio-118, 715 N.E.2d 540. Rather, the Commission and Court have repeatedly applied the Commission's jurisdictional statutes to the facts to find that landlords providing electricity to tenants are not public utilities. Accordingly, no "landlord-tenant exception" to R.C. 4905.03(C) exists, only the language of that statute exists and the application of the facts to the statute. (NEP Reply Br. at 15-16.)

{¶ 95} In jurisdictional decisions concerning landlords and utility providers, the Commission has used the *Shroyer* test to assist in deciding whether a landlord is operating as a public utility when charging tenants separately for utility usage. The *Shroyer* test resulted from the Commission's opinion in *In re Shroyer*, Opinion and Order (Feb. 27, 1992). NEP points out that the Court affirmed Commission usage of the *Shroyer* test in *Pledger* because the jurisdictional statute in *Pledger* was not self-applying in the context of the landlord-tenant relationship. The Court defined "self-applying" as meaning that the statute requires "no more for interpretation than a familiarity with the ordinary meanings of the words." (NEP Initial Br. at 41; *Pledger* at ¶ 17.)

{¶ 96} The *Shroyer* test provides three questions for the Commission to consider: (1) has the landlord manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right of way for utility purpose; (2) are the services available to the general public rather than just to tenants; and (3) is the provision of services ancillary to the landlord's primary business? (NEP Initial Br. at 42; *Pledger* at ¶ 18.) The Commission used the *Shroyer* test in this form for many years, without any intervention from the Court in its application, but ultimately adopted a modified *Shroyer* test in 2017 (NEP Initial Br. at 42; *See In re Commission's Investigation of Submetering in the State of Ohio, Case No. Pub. Util. Comm.*, Case No. 15-1594-AU-COI, Second Entry on Rehearing (June 21, 2017) at ¶¶ 49-50). The *Wingo*

decision, however, decreed that the modified *Shroyer* test was not based in the jurisdictional statute and, therefore, remanded the case to the Commission with the directive outlined above (NEP Initial Br. at 42; *Wingo* at ¶ 26).

{¶ 97} NEP asserts that the *Wingo* decision did not change any of the Court's or the Commission's previous decisions on submetering with the exception of reversing the Commission's usage of the modified *Shroyer* test. NEP believes that the directive of the Court was for the Commission to determine whether it has jurisdiction based on the jurisdictional statute, not the modified *Shroyer* test and that any jurisdictional test utilized by the Commission must be anchored in the statutory language of R.C. 4905.03(C). NEP asserts that the original *Shroyer* test, which prevented AEP Ohio from denying submetering conversions for over 20 years, is such a test and that the Court made no declaration as to the inapplicability of the original *Shroyer* test in the *Wingo* decision. Further, NEP stresses that the Court explicitly noted that harm is not a jurisdictional issue and should only be addressed if it is determined that an activity falls within the Commission's jurisdiction. In short, NEP disagrees with a key premise of AEP Ohio's claims; namely, that *Wingo* altered prior Court decisions on the resale of energy or its view of the *Shroyer* test. (NEP Initial Br. at 42-43; *Wingo* at ¶¶ 21, 23, 26.)

{¶ 98} In response to AEP Ohio's interpretation of *Wingo*, NEP retorts that the only question addressed by the Court, as stated twice in its opinion, was "whether the PUCO's use of the modified *Shroyer* test to determine the extent of its jurisdiction is appropriate." *Wingo* at ¶¶ 15, 17. NEP argues that no other question was analyzed or decided, so no "sea change" in law, as AEP Ohio calls it, could have occurred. The Court's decision in *Wingo*, as recognized by the Commission, simply rejected the modified *Shroyer* test and did not set aside *Pledger* or *FirstEnergy*. *AEP Ohio v. NEP*, Case No. 21-990-EL-CSS, Entry (July 27, 2022) at ¶ 39. NEP then notes that AEP Ohio claims that the *Wingo* decision resulted in two other important impacts. First, AEP Ohio argues that the Court recognized third-party submetering as a new fact pattern never previously addressed in prior Court and Commission cases. According to NEP, the Court's summary at Paragraph 3 of its decision

was an attempt to describe the evolution of submetering without the assistance of a factual record like the record that exists in this case. Second, AEP Ohio claims that the second important impact of *Wingo* was to create a gap in the law; however, NEP argues that Commission precedent exists previously finding that a third-party company providing water submetering services to a mobile park owner was not a public utility and that the reselling of telephone service to tenants by entities, including third parties, did not qualify those entities as public utilities. *In re Complaint of Steve and Tammy Dumeney and Sharon Felix v. Aquameter, Inc.*, Case No. 96-397-WW-CSS, Opinion and Order (Jan. 4, 2001) at 6; *In re Commission Investigation into the Resale and Sharing of Local Exchange Telephone Service*, Case No. 85-1199-TP-COI, Opinion and Order (Aug. 19, 1986). Also, NEP asserts that AEP Ohio again misrepresents *Wingo* when it argues that the Court could have applied *Brooks*, *Pledger*, and *FirstEnergy* and determined for itself whether NEP is a public utility, making a remand unnecessary. NEP argues that AEP Ohio's position is unavailing because whether NEP is a public utility was not one of the propositions of law before the Court and could not have been decided. According to NEP, the Court struck that exact issue from being considered in Ms. Wingo's appeal. *Wingo* at ¶ 6 (granting motion to dismiss proposition of law No. V). (NEP Reply Br. at 9-13.)

{¶ 99} Before making its arguments regarding why AEP Ohio's Complaint should be dismissed, NEP emphasizes again that, when determining whether the Commission has jurisdiction over an entity, the statute requires that the entity is "engaged in the business of supplying" and, in fact, "supplies" electricity "to consumers." R.C. 4905.03(C). According to NEP, AEP Ohio's test does not look to the definition of R.C. 4905.03 to determine whether an entity is a public utility. Instead, it looks at the activities of an entity in comparison to that of a current public utility to determine whether the entity "impersonates" a public utility, thereby abandoning the statutory definition of R.C. 4905.03(C). NEP believes that AEP Ohio's test intrinsically requires extensive litigation at each and every property in which a landlord hires a third-party contractor, meaning the Commission will have to determine whether an entity has enough similar activities to a public utility even though the

concept of sufficient similar activities is unknown. Neither AEP Ohio nor its expert argues NEP can provide any specifics on when an entity goes from not being a public utility to being one, in other words, what specific activities should be considered, how many activities should be considered, and what weight should be attributed to those activities (Tr. I at 120-122). (NEP Reply Br. at 58-60.)

{¶ 100} NEP avers that the Commission has many bases for finding that NEP is not operating as a public utility and is not an electric light company. First, the services provided to a landlord on the landlord's side of the utility, and on the landlord's property, are outside the jurisdiction of the Commission. Second, NEP argues that it does not supply electricity and is not in the business of selling electricity, and thus fails to meet the definition of an "electric light company" under R.C. 4905.03(C). Third, while NEP argues that the *Shroyer* test is unnecessary in this case, if the *Shroyer* test were to be applied to both NEP and any of the landlords at the Apartment Complexes, NEP states that neither entity would be found to be acting as a public utility. Fourth, NEP stresses that it simply acts on behalf of and as an agent of the landlords and that its actions are legally those of the principal/landlord and that NEP does nothing that each landlord could otherwise do. NEP argues that the Commission's jurisdiction, and AEP Ohio's exercise of its monopoly, cannot extend to the landlord's decisions concerning which companies it hires to effectively carry out its own business operations. (NEP Initial Br. at 43-44.)

{¶ 101} Regarding the first independent basis on which the Commission can rule in NEP's favor, NEP argues that services provided to the landlord on the landlord's side of the utility meter are outside of the scope of AEP Ohio's certified territory, and, therefore, NEP cannot be a public utility. According to NEP, the above conclusion is a bright-line test that proves that NEP submetering services are beyond the scope of the utility's certified territory and outside the jurisdiction of the Commission. NEP points to the analysis provided by Mr. Centolella in his direct testimony in support of this basis. (NEP Initial Br. at 44; NEP Ex. 88 at 16-18.)

{¶ 102} A key difference between a waterworks company and electric light company is that electric light companies have service area monopolies granted under the CTA. The CTA led to the mapping of defined service areas for each Ohio investor-owned and not-for-profit EDU. NEP states that the importance of the CTA in this case is that it "informs and reconciles" application of R.C. 4905.03(C) to third-party, behind-the-meter service providers in the context of landlord-tenant relationships. (NEP Initial Br. at 44-45.)

{¶ 103} NEP submits that the Commission cannot apply R.C. 4905.03 without ensuring that its application to third-party submetering providers reconciles with the CTA. NEP argues that such an analysis by the Commission in prior cases led to the longstanding rule that companies providing services to landlords on the landlords' side of the utility meter and on the landlords' properties cannot be an electric light company under R.C. 4905.03. The utility meter is, in NEP's words, the "point of demarcation," and NEP argues that neither the Commission nor AEP Ohio have the power to exercise jurisdiction past the utility meter. (NEP Initial Br. at 45.)

{¶ 104} In his testimony, NEP witness Centolella detailed his interpretation of how the statutes within the CTA inform application of R.C. 4905.03(C). The CTA contains three provisions that outline the scope of certified territories relevant for this case. R.C. 4933.83(A) provides that, "…each electric supplier shall have the exclusive right to furnish electric service *to* all electric load centers located presently or in the future within its certified territory…" (emphasis added by NEP). R.C. 4933.81(F) defines "electric service" as later used in R.C. 4933.83 to mean "retail electric service furnished *to* an electric load center for ultimate consumption…" (emphasis added by NEP). Mr. Centolella points out that these statutes refer to a utility providing electric service "to" an electric load center, not "within" an electric load center. Finally, Mr. Centolella says that R.C. 4933.81(E) defines an "electric load center" as facilities at a single location that "…have been, are, or will be connected to and served as a metered point of delivery and *to* which electric service has been, is, or will be rendered" (emphasis added by NEP). Analyzing these statutes in conjunction, Mr. Centolella opines that electric suppliers that have certified territories provided electric

service "at a metered point of delivery" to which electric service is rendered. (NEP Initial Br. at 45-46; NEP Ex. 88 at 13-14.) Mr. Centolella avers that the language in these statutes is specific and that it is a "cardinal rule" of statutory construction to accord meaning, where possible, to every word in the statute, including prepositions such as "to." Thus, Mr. Centolella states that the CTA supports the proposition that a utility's exclusive right to provide electric service stops at the metered point of delivery to the customer. (NEP Initial Br. at 46; NEP Ex. 88 at 14.) NEP argues that this line of analysis was confirmed by the Commission in *Brooks*, wherein the Commission stated that the utility's "obligation to serve either facility ends at the landlord's property line" and that the a utility's "power to prohibit or restrict electrical service between the landlord and tenants through the company's tariff must also end at the landlord's property line" (NEP Initial Br. at 46; *Brooks*, Opinion and Order (May 8, 1996) at 16). NEP states that this analysis was later affirmed by the Supreme Court of Ohio (NEP Initial Br. at 46; *FirstEnergy* at ¶ 10).

{¶ 105} Mr. Centolella argues that because a utility's right to serve ends at the metered point of delivery to the customer, what happens on a landlord's side of the metered point of delivery is not within the scope of the certified territory, regardless of the service provided. Additionally, Mr. Centolella avers that services provided only on a customer's side of the meter are not included in the definition of "electric service" for purposes of Chapter 4933. Thus, based on this analysis, NEP argues that the only statutory conclusion is that services provided on the customer's side of the meter cannot be in violation of the CTA. (NEP Initial Br. at 46-47; NEP Ex. 88 at 14; *see also* R.C. 4933.81(F).)

{¶ 106} NEP submits that if there can be no violation of the CTA on the landlord's side of the meter, then a company providing such services on that side of the meter cannot be an electric light company under R.C. 4905.03(C). Given cross-references within the statutes, NEP argues that R.C. 4933.81(A), R.C. 4905.03(C), and R.C. 4933.81(A) must be read together. NEP argues that the General Assembly could not have based R.C. 4933.81(A) on R.C. 4905.03(C) if it intended companies that would not qualify for certified territories to be considered electric light companies and public utilities for purpose of R.C. Chapter 4905.

Further, NEP points to the definition of an "electric utility" in R.C. 4928.01(A)(11), which defines it as "an electric light company that has a certified territory and is engaged on a for-profit basis in the business of supplying a noncompetitive retail electric service or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state." A company operating only on the customer side of the meter cannot provide a "noncompetitive" service because the customer may choose between service providers or choose to forego that service altogether. Thus, according to NEP, treating a company that provides services only on the customer side of the meter as a utility would create irreconcilable conflicts between different chapters of the Revised Code. In other words, such a company would be an electric light company under R.C. 4905.03(C) but at the same time is not in violation of the CTA and not be an "electric utility" under R.C. 4928.01(A)(11). That result would create conflict within Chapter 49 of the Revised Code, which could not have been the intent of the General Assembly. (NEP Initial Br. at 48.)

{¶ 107} AEP Ohio argues, according to NEP, that because it previously had individual residential meters at the five Apartment Complexes, it has the exclusive obligation and right to provide noncompetitive wire service to the tenants regardless of whether the landlord desires to convert to master meters under AEP Ohio's tariff. NEP asserts that this argument does not square with the CTA. If such an interpretation was accurate, then every landlord, industrial complex owner, and shopping center owner seeking to convert their properties to master meters would be unable to do so under AEP Ohio's reading of the CTA, including Oak Creek and Worthing Square's apartment complexes (NEP Ex. 2). As noted above, R.C. 4933.81(E) defines "electric load center" as "facilities" and not as "meters" or "customers" as AEP Ohio insists. For support of its argument, NEP states that the Supreme Court of Ohio has affirmed the Commission's interpretation of "electric consuming facilities" to mean "* * * buildings, structures, installations, or other man-made improvements that are served by electricity." *Union Rural Electric Cooperative, Inc. v. PUCO*, 52 Ohio St.3d 78, 80, 555 N.E.2d 641, 643, (1990) (*Union Rural*). In other words, writes NEP, each complex is an electric load center and AEP Ohio

has a right to provide the electric service to each complex, which is exactly what AEP Ohio is doing—providing service to the master-meters at the five apartment complexes. But, AEP Ohio does not have the right to directly serve each apartment post master-meter conversion (Tr. V at 982-83). (NEP Reply Br. at 37-39.).

{¶ 108} NEP also asserts that the Commission may also consider interpreting the CTA as that AEP Ohio never had the right to serve tenants in the first place, noting that an apartment complex is the "facility" and, therefore, the "load center" regardless of which metering configuration is chosen by the landlord (NEP Reply Br. at 39).

{¶ 109} NEP asserts that AEP Ohio's attempt to cast doubt on Mr. Centolella's testimony through an example of an apartment community straddling two service territories fails because it ignores an entire section of the CTA that resolves exactly that issue. NEP argues that, in those instances, "the electric supplier in whose certified territory the greater portion of the land area covered by the electric load center is located shall serve that electric load. R.C. 4933.83(A); *See Union Rural*. (NEP Reply Br. at 40.)

{¶ 110} Moreover, in response to AEP Ohio's attempt to imply that Mr. Centolella's analysis is flawed because he acknowledged that a customer reselling electricity to the owner of a house on a separate property would create a resale issue, NEP asserts that Mr. Centolella is correct because in that circumstance, the electric load center at issue is the neighbor's property/house (Tr. V at 999-1000). Under the CTA, argues NEP, AEP Ohio has the right to provide service to that separate load center which is on the separate property with a different owner, just as AEP Ohio has the right to provide service to each of the Apartment Complexes. (NEP Reply Br. at 43-44.)

{¶ 111} NEP points to multiple reasons provided by Ringenbach and Centolella as to why keeping a strict point of demarcation at the utility meter is important, and NEP submits that all of these reasons support finding that NEP cannot be a public utility. Ringenbach highlighted the many services that NEP offers to customers and the benefits that these services provide to customers/landlords. (NEP Initial Br. at 49; NEP Ex. 90 at 6-

7.) Centolella concurred in Ringenbach's points and contends that it would create dangerous Commission precedent if AEP Ohio were allowed to interfere with a customer's choice of service providers on their side of the meter. NEP avers that the Commission should follow Centolella's advice and find that companies providing services to landlords on the landlords' side of the utility meter cannot be electric light companies under R.C. 4905.03(C). (NEP Initial Br. at 49; NEP Ex. 88 at 24.)

{¶ 112} Regarding the second independent basis upon which the Commission can rely to determine that NEP is not a public utility, NEP argues that it is not a public utility based on the plain language of R.C. 4905.03(C). NEP states that under the plain language of R.C. 4905.03(C), the Commission can only exercise jurisdiction over an entity as an electric light company if the entity is "… engaged *in the business of supplying* electricity for light, heat, or power purposes *to consumers* within this state…" (emphasis added by NEP). NEP argues that not only is the language in this statute unambiguous, but it is also self-applying and there is no need to apply the *Shroyer* test in this case. To prove that NEP is operating as a public utility, NEP submits that AEP Ohio must prove the following: (1) that NEP "supplies" electricity within the meaning of the statute; (2) that its supply is "to consumers" under the Supreme Court's holding in *Pledger*; and (3) that it is "in the business" of supplying to consumers. NEP avers that the facts of this case demonstrate that AEP Ohio cannot prove any of these points and, therefore, NEP cannot be a public utility as a matter of law. (NEP Initial Br. at 51.)

{¶ 113} Further, in response to AEP Ohio, NEP points out that nowhere in the language of the jurisdictional statute, R.C. 4905.03(C), does it speak to examining whether NEP is "impersonating" a public utility, on which NEP believes AEP Ohio hinges its argument. According to NEP, the fact that the property owner has contracted with NEP to assist the owner with submetering activities such as reading meters, installing infrastructure, handling tenant payments, and other landlord activities does not answer the question of whether NEP is engaged in the business of supplying electricity at the five complexes. NEP contends that the question is answered by application of the undisputed

facts that AEP Ohio tries to evade in its brief: (1) the landlords, not NEP, take delivery and title to the electricity as the AEP Ohio customer of record; (2) the landlords, not NEP, supply the electricity to the tenants under the terms of the leases; (3) the landlords, not NEP, own all electrical infrastructure on the properties; and (4) the landlords have entered into an express agency relationship with NEP by contracts and through AEP Ohio's customer letter of authorization (LOA) form. (NEP Reply Br. at 18-19.)

{¶ 114} NEP reiterates that it does not and cannot supply electricity at the five Apartment Complexes and that this conclusion is dispositive. NEP argues that before applying the *Shroyer* test, the Commission must first find that NEP "supplies" electricity within the plain meaning of R.C. 4905.03(C). As part of this inquiry, the Commission must determine whether it is NEP or the landlord that will supply electricity to tenants. NEP points to the contracts it entered into with each landlord in the Apartment Complexes to support its contention that it is the landlord, not NEP, that supplies electricity to tenants. And NEP against asserts that a landlord is well within its rights to supply the electricity under a master-meter arrangement. (NEP Initial Br. at 51-53; NEP Ex. G at G-14, 58, 100, 145, 189.)

{¶ 115} In further support of its contention that it cannot be supplying electricity to tenants, NEP offers four primary arguments. First, according to NEP, the only evidence admitted at the evidentiary hearing on ownership of the electrical infrastructure at the Apartment Complexes shows that the landlords own all such equipment on the property (NEP Initial Br. at 53; NEP Ex. 90 at 24; see also NEP Ex. G). NEP asserts that its witnesses supported this conclusion, as well (Tr. VI at 1145; NEP Ex. 91 at 8). The Amendment and Supplement to MIA and CCSA executed between NEP and the property owners expressly provides that "Customer is deemed to be the owner and title holder of the Meter Equipment" (NEP Ex. 90, Ex. G at G-42-44, 84-85, 128-130, 172-174, 217-219). According to NEP, parties have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced (Tr. I at 114-15). *Total Quality Logistics, L.L.C. v. JK & R Express, L.L.C.*, 164 Ohio St.3d 495, 2020-Ohio-6816, 173 N.E.3d 1168, ¶ 16, quoting

Nottingdale Homeowners' Assn., Inc. v. Darby, 33 Ohio St.3d 32, 36, 514 N.E.2d 702 (1987); see also *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 8; *Blount v. Smith*, 12 Ohio St.2d 41, 47, 231 N.E.2d 301 (1967); *Ponser v. St. Paul Fire & Marine Ins. Co.*, 104 Ohio St.3d 621, 2004-Ohio-7105, 821 N.E.2d 173, ¶ 47, quoting *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987), paragraph one of the syllabus. In response to AEP Ohio's argument that no consideration was given by the landlords to NEP for the meter amendment agreements, NEP asserts that such a claim is untrue and that each amendment includes language that notes that consideration was given, "* * * in consideration of mutual covenants described herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged * * *" (NEP Ex. 90, Ex. G at G-42, 84, 128, 172, 217). For example, NEP states that the consideration given included provisions that benefited NEP such as the ability to terminate the contracts under a change in law provision if the Commission ruled against NEP and the ability to call force majeure for the act or omission of the utility (NEP Ex. 90, Ex. G at G-84-85). (NEP Reply Br. at 25-27.)

{¶ 116} In response to AEP Ohio's argument that the landlords' ownership of the non-meter equipment infrastructure on their properties is "suspect as a factual matter," NEP first argues that NEP's witnesses confirmed that NEP does not own the non-meter equipment (NEP Ex. 90 at 24-25; Tr. VI at 1145; NEP Ex. 91 at 8). Secondly, the infrastructure installed by NEP becomes a fixture on the landlord's property and part of that property under black letter law, "[i]t is generally held that the intention of the annexing party is of primary importance * * * [t]he intention to annex personal property so that it becomes a part of the realty, or the contrary, may be manifested in a contract." *Masheter v. Boehm*, 37 Ohio St.2d 68, 74-75, 307 N.E.2d 533 (1974). Furthermore, NEP argues that AEP Ohio misrepresents facts when it argues that the landlords' ownership of the non-meter equipment on their properties is inconsequential since NEP has control over the facilities. According to NEP, Mr. Depinet and Ms. Ringenbach testified that NEP's customers regularly hire their own electricians to repair and maintain their infrastructure, often without notifying NEP (Tr. VII at 1231-1232; Tr. VI at 1144). In response to AEP Ohio's

remark that NEP carries insurance on the distribution equipment, NEP argues that the only insurance that NEP is required by its contracts to provide is workers' compensation and employer liability or similar insurance with respect to employees (NEP Ex. 90, Ex. G at G-18 (CCSA General Terms and Conditions 1.c.). Finally, NEP notes that when its contracts with the property owners terminate, the landlords retain all of the infrastructure on their properties (Tr. Vol. VI at 1144-1145; NEP Ex. G (Amendment and Supplement at 1.A.). (NEP Reply Br. at 27-29.)

{¶ 117} Second, NEP states that the utility accounts on record with AEP Ohio are either (at the time of hearing) in the name of the property owner or in the process of being corrected into the property owner's name (NEP Initial Br. at 53; Tr. VI at 1026-1028). Although AEP Ohio does not mention in its initial brief that the property owners are or will be the customers of record, NEP argues that, as Mr. Williams agreed on cross-examination, the use of AEP Ohio's own customer LOA can allow a third-party to manage the entirety of a commercial customer's account, including receiving and paying bills (Tr. II at 258-260, 389-390 - CONFIDENTIAL; NEP Reply Br. at 21).

{¶ 118} Third, NEP has no independent contract with any tenants at the Apartment Complexes and acts only as the agent of the landlord in regard to NEP's interactions with tenants, such as in calculating bills and collecting payments (NEP Initial Br. at 53; NEP Ex. 90 at 14-15, 19). In a similar vein, NEP notes that Ms. Ringenbach testified that the landlord must have each tenant at the Apartment Complexes agree to specific lease language that ensures the tenant agrees to be submetered and that the landlord, not NEP, secures and resells electricity (NEP Ex. 90 at 10, Ex. G at G-14, 58, 100, 145, and 189 (CCSA 4.4.1)). Also, according to NEP, each tenant must agree to the landlord's supply of electricity before final conversion to a master-metered commercial account is completed (NEP Ex. 90 at 10, 17). NEP contends that, if the activities that AEP Ohio points to actually do constitute "supplying electricity," then every landlord in Ohio that submeters, as well as every electrical contractor, property manager, and billing company would be a public utility. (NEP Reply Br. at 22-23.)

{¶ 119} Fourth, NEP declares that it is "undisputed" that the property owners at the Apartment Complexes take delivery of and title to the power provided to them by AEP Ohio. NEP points to the language in the CCSA executed with each landlord, which states that each owner must take service from the applicable utility, meaning taking delivery and title of the electricity. In further support, NEP points outs that if a landlord terminated its contract with NEP, there would be no cut off or disruption of electric service to the property – AEP Ohio would continue to supply electricity to the landlords and the landlords could continue to supply electricity to tenants. (NEP Initial Br. at 54; NEP Ex. G at G-9, 52-53, 95, 139-140, 184; NEP Ex. 88 at 5.)

{¶ 120} NEP asserts that, contrary to AEP Ohio's outlook in this case, the Commission should not solely look at the substance of the situation over the form since form matters. According to NEP, the form of the agreements governing the relative rights and obligations of the parties involved is the only way to determine which of two potential parties are supplying the electricity. For example, the only way to determine whether any given customer taking default service or CRES has title to the delivered electricity is to examine the relevant contracts or tariff. Moreover, NEP states that title matters when discerning between a CRES supplier and a broker, plus title establishes that the landlord and not NEP is supplying electricity to tenants; therefore, NEP asserts that there is no substance beyond form (NEP Ex. 88 at 9; Ohio Adm.Code 4901:1-21-01). (NEP Reply Br. at 21-22, 42.) In response to AEP Ohio trying to discount the importance of NEP not taking title to the electricity by claiming that AEP Ohio also does not take title to electricity it delivers for CRES suppliers, NEP contends that this argument is a distraction that ignores the language of R.C. 4905.03(C) that specifically captures AEP Ohio whereas it does not capture NEP. Moreover, NEP notes that, when the 1999 passage of Am.Sub. S.B. 3 of the 123rd General Assembly adopted R.C. 4928, the new code chapter implemented the deregulation of electricity decades after R.C. 4905.03(C) and its predecessor forms were enacted. Accordingly, title does matter as part of the factual support for why NEP is not operating as an electric light company as defined in R.C. 4905.03(C). (NEP Ex. 88 at 16-17;

NEP Reply Br. at 42.) In summary, NEP states that it is impossible for NEP to be supplying electricity, which means that the Commission has no jurisdiction over NEP. NEP states that the landlords are the entities that supply electricity through their leases with tenants and that the landlords take service from AEP Ohio – NEP is simply a service provider acting on behalf of the landlord. Because it is not supplying electricity, NEP states that it cannot be an electric light company under R.C. 4905.03(C). (NEP Initial Br. at 54-55.)

{¶ 121} NEP next provides its response to AEP Ohio's arguments as to why NEP is "supplying electricity." In response to AEP Ohio's claim that NEP installs, maintains, and repairs infrastructure at the Apartment Complexes and therefore should be considered supplying electricity, NEP argues that contracting with a landlord to install electric infrastructure on the landlord's property as well as maintaining and repairing such equipment does not qualify as supplying electricity. If that was the case, in NEP's view, every contractor that AEP Ohio uses to do any of this work on its behalf would be a public utility. NEP also states that, while AEP Ohio believes it is significant that NEP or its subcontractors install equipment that resembles what a utility would install, it is worth noting that much of this equipment is required by AEP Ohio's own Bluebook and that "private electric distribution infrastructure" is a common term used by commercial and industrial customers, including some hospitals (Tr. VII at 1183-1184; Tr. VI at 1056-1057).

{¶ 122} In response to AEP Ohio arguing that NEP arranging and paying for electricity supports a conclusion that NEP is supplying electricity, NEP asserts that it can arrange and pay for the landlord's utility service because NEP is authorized to interact with AEP Ohio on behalf of the landlord both through the customer LOA form and the agency language in its contracts. Moreover, NEP states that the words "arranging for the supply" do not appear in R.C. 4905.03(C). In response to AEP Ohio's argument asserting that NEP is supplying electricity by reading meters and billing tenants, NEP contends that the statute makes no reference that reading meters and billing tenants renders an entity a public utility. NEP states that the Ohio Supreme Court has previously noted that metering is not an integral part of supplying electricity, and the statute does not mention metering. *Direct*

Energy Bus., L.L.C. v. Duke Energy Ohio, Inc., 161 Ohio St.3d 271, 2020-Ohio-4429, 162 N.E.3d 271, (2020) ¶ 16. Further, there is no prohibition precluding the owners of the Apartment Complexes from contracting with a third-party to read meters, bill tenants, and remit payments to AEP Ohio. In response to AEP Ohio's argument that NEP's electric bills to tenants provide a striking example of NEP "engaged in the business of supplying electricity," NEP asserts that the format of a bill agreed upon between NEP and the property owners included in the contracts between them have no bearing on whether NEP is supplying electricity and, in fact, highlights AEP Ohio's lack of credibility in this matter. And, in response to AEP Ohio's argument that the landlord's authorization that NEP provide payment plans and engage in disconnects for failure to pay shows that NEP is supplying electricity, NEP asserts that the landlords have contracted with NEP and, as a part of those contracts and on behalf of each landlord, NEP provides payment plans and has authority to disconnect at the direction of and on behalf of the landlord (NEP Ex. 90, Ex. G at G-55-56 (CCSA 1.4.6, 1.5), G-51 (CCSA 1.1.1)). Ultimately, NEP argues that whether NEP offers payment plans or resolves tenant disputes, the appearance of the bills, the type of equipment it installs, or its handling of payments is unrelated to the language, "engaged in the business of supplying electricity," and inapplicable to the case at hand. (NEP Reply Br. at 23-25.)

{¶ 123} Even if NEP supplied electricity within the meaning of the statute (which NEP adamantly asserts it does not), any supply by NEP would not be "to consumers" as the phrase is used in R.C. 4905.03(C). NEP points back to *Pledger*, wherein the Ohio Supreme Court held that, in a submetering arrangement, it is the landlord who is the "consumer" for purposes of R.C. 4905.03(C), not the tenant. NEP avers that under the ordinary meaning of the language in the statute, the Commission has no jurisdiction over NEP. (NEP Initial Br. at 55.)

{¶ 124} NEP argues that because each landlord is the "consumer," and not the landlords' tenants, NEP cannot be a public utility and electric light company under R.C. 4905.03(C). AEP Ohio's obligation to serve ends at the landlord's property line, as does its

ability to prohibit or restrict electric services between the landlord and tenants via AEP Ohio's tariff. Similarly, just as AEP Ohio's obligation ends at this "point of demarcation," NEP submits that the Commission's jurisdiction to regulate those same services also ends there. If the Commission's jurisdiction ends at the master meter, NEP argues that there can be no "consumer" past this jurisdictional line. (NEP Initial Br. at 56-57 citing *In re Complaint of S.G. Foods, Inc. et al. v. FirstEnergy Corp., et al.*, Case No. 04-28-EL-CSS, et al., Entry (Mar. 7, 2006) at 34; *In re Complaint of Tobi Pledger, et al. v. Capital Properties Management, Ltd.*, Case No. 04-1059-WW-CSS, Entry on Rehearing (Nov. 23, 2004) at ¶ 6; *Brooks*, Opinion and Order (May 8, 1996) at 16.)

{¶ 125} Even if NEP did "supply" electricity "to consumers" within the meaning of R.C. 4905.03(C) (which NEP maintains it does not), NEP states that it still is not "in the business" of supplying electricity and, therefore, cannot be a public utility. NEP states that its business involves contracting with customers to provide a range of services, none of which includes supplying electricity. According to NEP, its customers do not hire it to supply electricity but to deploy the company's experience and resources to ensure that a landlord's submetering arrangements with tenants are managed professionally and economically, as well as to take advantage of many add-on services. (NEP Initial Br. at 57; NEP Ex. 90 at 17-18.) Ms. Ringenbach outlines the assortment of services offered by NEP to developers and property owners, such as energy control and advisory services, energy construction and design solutions, electric vehicle charging, equipment financing, utility rates and tariff monitoring and support, tenant billing and other energy related services as NEP's clients may request. Ms. Ringenbach confirms that these are the types of services that NEP intends to provide at the Apartment Complexes. Thus, NEP's customer is each landlord, with whom NEP has a separate contract – not the tenant. Any billing or metering services provided by NEP is limited to and governed by the applicable contract. NEP states that assuming these duties on a landlord's behalf is its primary business. (NEP Initial Br. at 58-59; NEP Ex. 90 at 3, 4, 23, 25; Tr. VI at 1023.)

{¶ 126} Another important fact to this point is that NEP's customers contract to allow NEP to act as their authorized representative with the local utility. Each contract has agency language granting NEP the authority to act on behalf of the customer on utility matters such as receiving and paying utility bills, setting up accounts as necessary, and executing contracts related to utilities in the name of the customer. NEP highlights a number of provisions within the CCSA with each customer in which NEP is authorized to act on behalf of and at the direction of a landlord. (NEP Initial Br. at 59-60; NEP Ex. 90 at 4, 15, Ex. E; NEP Ex. G at G-8, 31, 74, 117, 161 and 206.)

{¶ 127} NEP contends that its agency relationship with the property owners shows that NEP is not in the business of supplying electricity; rather, NEP is a service provider to a landlord that has exercised its rights under Ohio law and AEP Ohio's tariff to convert to master-meter service at its property. Each of NEP's customers at the Apartment Complexes (the property owners) is still supplied electricity by AEP Ohio and it is then the landlord that resells the electricity to tenants through lease agreements. NEP states that there is nothing in the record to demonstrate that any part of NEP's business is of "such character that the product and service is available to the public generally and indiscriminately," or that NEP has accepted "public franchises or calling to its aid the police power of the state." (NEP Initial Br. at 60-61 citing *Southern Ohio Power Co. v. Public Utilities Com.*, 110 Ohio St. 246, 143 N.E. 700, paragraph two of the syllabus (1924)). NEP declares, therefore, that it is not in the business of supplying electricity, which fact alone is sufficient to dispose of AEP Ohio's Complaint (NEP Initial Br. at 61).

{¶ 128} Regarding the third independent basis upon which the Commission can rely to determine NEP is not a public utility, NEP argues that its services at the Apartment Complexes do not fail the *Shroyer* test. NEP believes that it is unnecessary for the Commission to apply the *Shroyer* test in this proceeding because RC. 4905.03(C) is self-applying. However, if the Commission does apply *Shroyer*, NEP submits that the Commission must first apply the *Shroyer* test to the five owners at the Apartment Complexes. NEP states that it is already well-established that landlords who submeter

services to tenants are not considered a public utility under the *Shroyer* test. It then follows, according to NEP, that the property owners' agent and service provider, NEP, cannot be a public utility. But even if the *Shroyer* test is applied to NEP with respect to activities at the five Apartment Complexes, the Commission must first find that NEP supplies electricity, which NEP went to great lengths to prove it does not (see above). NEP states that the second and third prongs of the *Shroyer* test should not even be applied unless the entity in question does in fact provide utility services. Even if the Commission does apply the *Shroyer* test to NEP, it should find that NEP is not a public utility. (NEP Initial Br. at 61-62.)

{¶ 129} AEP Ohio cannot dispute that a landlord that submeters is not a public utility subject to the Commission's jurisdiction – NEP submits that this is evidenced by the fact that AEP Ohio has allowed submetering conversions to proceed at two other similar apartment complexes in Columbus so long as the landlord itself conducts the submetering operations without the use of a third-party submetering company. NEP acknowledges that this result is correct and is consistent with Commission and Ohio Supreme Court precedent. With respect to the Apartment Complexes, NEP asserts that there is no evidence that any of the landlords manifested an intent to be a public utility by availing themselves of the special benefits available to public utilities. These benefits include the granting of a franchised territory, certificate of public convenience and necessity, use of eminent domain, use of public rights-of-way for utility service, among others. Further, NEP states that the landlord's provision of electricity for tenants was never intended to be a service available to the general public. Thus, the provision of electricity to each landlord's tenants is ancillary to the landlord's primary business. Based upon these facts, NEP urges the Commission to find that none of the landlords at the Apartment Complexes are public utilities under the *Shroyer* test, which it says is supported by the fact that AEP Ohio did not bring a complaint against any of the property owners at the Apartment Complexes. (NEP Initial Br. at 62-63; AEP Ohio Ex. 3 at 14, Ex. JFW-2; *see also Shroyer* at 4, *Pledger at* ¶ 24.)

{¶ 130} If none of the owners at the Apartment Complexes are a public utility under *Shroyer*, NEP avers that it follows that any party contracting to act as agent of these owners

to perform actions that the owners may conduct cannot be a public utility. As reiterated ad nauseum by NEP throughout its briefs, the jurisdictional boundary of the master meter means that a landlord is not a public utility under *Shroyer* and, as such, any activities of the landlord on its property-side of that boundary are outside the jurisdiction of the Commission. NEP argues that this includes hiring a third-party company, such as itself, to assist with the installation of electric infrastructure and submetering of tenants. (NEP Initial Br. at 63-64.)

{¶ 131} If the *Shroyer* test is applied to NEP, it submits that it should be "undisputed" that NEP does not avail itself of the special benefits of a public utility. NEP states that: NEP does not have a grant of a franchised territory nor a certificate of public convenience and necessity; NEP does not use eminent domain, and all of its construction activities for a customer are limited to the customer's property; all of NEP's rights of access to properties is through the contracts NEP has with the landlords; all of NEP's services and rights of access arise through private contracts with property owners. Based on the foregoing, NEP concludes that the first *Shroyer* factor weighs against finding that NEP is acting as a public utility at the Apartment Complexes. (NEP Initial Br. at 65; NEP Ex. 90 at 18.) In response to AEP Ohio arguing that NEP fails the first prong because its bill format mimics a public utility's bills and NEP disconnects tenants for nonpayment, NEP first argues that a bill format is not a benefit available only to public utilities. Additionally, NEP asserts that it adopted its bill format well prior to AEP Ohio adopting its format, and the bill format was included as an exhibit in the contract between NEP and each owner (NEP Ex. 90, Ex. G at G-25-26). Regarding disconnection, NEP states that it is authorized in the contracts on behalf of the landlord to disconnect tenants' electric service, and the contract explicitly states that NEP disconnects tenants at the direction of the respective property owner (NEP Ex. 90, Ex. G at G-51 (CCSA 1.1.1), G-55-56 (CCSA 1.4.6, 1.5)). Also, landlord-tenant law, according to NEP does not prohibit disconnects by a landlord or its agent for failure to pay. *Sfaelos v. Lamb*, 3d Dist. Hancock No. 5-76-47, 1977 WL 199543, at 3 (June 28, 1977). Rather, R.C. 5321.15(A), which AEP Ohio only cites in part, prohibits landlords from terminating utilities

or services for the purposes of recovering possession of residential premises. R.C. 5321.15(A). NEP asserts that landlords who submeter are not prohibited from disconnecting tenants for nonpayment, and, if a tenant has an issue with any termination of utility services, R.C. 5321.15(C) provides recourse to the state courts. (NEP Reply Br. at 45-47.)

{¶ 132} NEP argues that the second prong *Shroyer* factor also weighs against a finding that NEP is a public utility. NEP states that it is also "undisputed" that NEP is only offering its services to the owners of the Apartment Complexes through private contracts. In turn, NEP's activities under each contract are limited to the respective property of each landlord. NEP again notes that it does not own any of the infrastructure at the Apartment Complexes. Based on these facts, NEP argues that the Commission should find that the second *Shroyer* factor weighs against finding that NEP is a public utility. (NEP Initial Br. at 65-66; NEP Ex. 90 at 4, 18, 20-21, 23-25; Tr. VI at 1023.) In response to AEP Ohio's argument that NEP serves the general public by growing its business and encompassing 1.75 percent of AEP Ohio's entire residential customer base, NEP retorts that its services, which do not include supplying electricity, are only offered to a select group, owners of multi-family properties and not to other commercial customers or to residential customers (NEP Ex. 90 at 18-19, 23). According to NEP, AEP Ohio's application would swallow the rule in that every business has at least some customers and every business wants to grow but not every business' services are available to the general public. NEP also notes that it does not serve residential customers, as AEP Ohio seems to infer, it serves landlords who are exercising their right to use master meters and take commercial service. (NEP Reply Br. at 45-48.)

{¶ 133} NEP argues that the third *Shroyer* factor weighs against a finding that NEP is a public utility. For the reasons stated previously, NEP reiterates that it does not supply electricity to anyone and, thus, the third *Shroyer* factor is inapplicable to NEP. (NEP Initial Br. at 66-67.) NEP also points to the Commission's reasoning in *Shroyer* regarding why it should not be inserting itself into the landlord-tenant relationship, noting that redistribution of utility services is a pervasive activity in the State and that the Commission does not have

the staff or statutory authority to insert itself into the landlord-tenant relationship. *Shroyer*, Opinion and Order (Feb. 27, 1992) at 4-5. (NEP Reply Br. at 48-49.)

{¶ 134} In the event that the Commission did find that NEP's actions constitute supplying electricity under the jurisdictional statute, NEP argues that any such supply is ancillary to NEP's primary business of providing services to the landlord. As noted above, NEP offers a variety of services to the landlords at the Apartment Complexes, primarily involving designing and constructing submetering infrastructure and acting as the landlords' agent for submetering and billing of tenants. NEP again stresses that functions that it will carry out on behalf of the landlords is clearly laid out in each contract between NEP and each landlord, none of which includes "supplying" electricity to its customers. (NEP Initial Br. at 67; NEP Ex. 90 at 23, 25; Tr. VI at 1023.)

{¶ 135} Regarding the fourth independent basis upon which the Commission can rely to determine that NEP is not a public utility, NEP argues that black letter agency law precludes the making of any legal distinction between NEP and the landlords who hire it. NEP notes that AEP Ohio does not dispute that landlords may choose to receive master-metered service and resell and redistribute that service to tenants. Further, NEP points out that AEP Ohio entered into contracts with other property owners during the pendency of this Complaint by which AEP Ohio will sell infrastructure at existing complexes to allow the owners to submeter tenants. Based on these actions, NEP states that it is astonished that AEP Ohio makes the complaint that the essential character of a landlord submetering tenants somehow changes when the landlord contracts with a third-party servicing company to handle the submetering services. If it is legal for a landlord to undertake these actions, NEP asserts that it is legal for NEP, as a landlord's agent, to perform the same actions. NEP states that a landlord must be permitted to contract with a service provider to assist the landlord with submetering its properties, just as AEP Ohio itself contracts with companies to assist it in providing its supply and distribution services. (NEP Initial Br. at 68; Tr. II at 215-216 - CONFIDENTIAL; Tr. I at 169-170; NEP Ex. 3 at tariff sheet 103-110, tariff sheet 210-211.)

{¶ 136} NEP recites the legal principal that "[t]he act of an agent constitutes the act of the principal (NEP Initial Br. at 68; *Yank v. Howard Hanna Real Estate Servs*., 7th Dist. No. 02 CA 117, 2003-Ohio-3471, at ¶ 31, citing *Lepera v. Fuson*, 83 Ohio App.3d 17, 23, 613 N.E.2d 1060 (1992)). NEP cites a bevy of legal authorities for the proposition that the relationship of principal and agent, and any resulting liability of the principal for acts of the agent, can be created by an express grant of authority by the principal, such as in a contract. (NEP Initial Br. at 68-69.)

{¶ 137} In this case, NEP asserts that the record shows that each of the five owners at the Apartment Complexes granted NEP agency authority by entering into a contract with NEP that authorizes NEP to act as the owner's agent in many capacities. Further, the five complex owners also granted NEP agency authority through AEP Ohio's third-party LOA form. (NEP Initial Br. at 69; NEP Ex. G.)

{¶ 138} NEP highlights the first section of each CCSA entered into by each of the five landlords, which provides that all services provided by NEP are "on Customer's (i.e. the landlord's) behalf." NEP points to specific sections of the CCSAs in which the landlord explicitly grants authority to NEP to perform certain actions on the landlord's behalf. For example, the following provides summaries of CCSA sections highlighted by NEP: Section 1.1.4 – granting NEP the right to enter into agreements with AEP Ohio on behalf of the landlord; Section 1.3.2 – NEP authorized to contract with an alternative commodity source and to enter into any necessary contractual arrangements connected thereto; Section 1.3.3 – NEP designated as the landlord's agent and authorized representative with respect to electric utility accounts; Section 1.3.5 – NEP designated to pay all electric commodity costs of the landlord; Section 1.4.2 – NEP designated to calculate bills and send bills to residents; Section 1.4.6 – NEP to receive payments from tenants on behalf the landlord, and the landlord authorizes NEP to disconnect electricity to a unit in the event of nonpayment; Section 1.5 – NEP authorized, at the landlord's direction, to disconnect electric service to residents for non-payment; Section 5.5 – NEP authorized as the landlord's authorized agent with the utility, with authority to negotiate and execute any documents associated with the

conversion to master-meter service; Exhibit E to CCSA – separate authorization of NEP to act on behalf of the account holder of the host utility electric accounts (i.e., the landlord) and authorized to enter into contracts for an alternative service provider. (NEP Initial Br. at 70-71; NEP Ex. G at G-7, 51, 93, 138, 182.)

{¶ 139} NEP states that Schedule 1 to each CCSA provides a clear grant of agency authority, in which the landlord grants NEP the authority to negotiate any and all agreements and other documents associated with enacting the property's master-metering arrangement (NEP Initial Br. at 71-72; NEP Ex. G at G-31, 74, 117, 161, 206).

{¶ 140} NEP points out that AEP Ohio provides its own LOA forms that allow a customer to grant agency authority to a representative. All five property owners at the Apartment Complexes completed an LOA form and submitted it to AEP Ohio. NEP notes that AEP Ohio witness Jon Williams (Managing Director, Customer Experience & Distribution Technology) acknowledged that the use of the LOA can allow a third-party to manage all of a commercial customer's account activity, including receiving and paying bills. (NEP Initial Br.at 72; Tr. II at 258-260, 389-390.) The LOAs completed by the owners of the Apartment Complexes name NEP as the third-party authorized to handle account activity for each applicable landlord. Quoting language from AEP Ohio's own LOA form, NEP notes that the form makes clear that the customer of record can designate an authorized party to "receive information or transact business on its behalf – or, in other words, grant agency authority." In the case of the owners of the Apartment Complexes, the scope of agency granted in this form is expansive, as the owner authorizes its agent to conduct "all activity and transactions." (NEP Initial Br. at 72; NEP Ex. 90 at 16, Ex. E; Tr. VI at 1025.)

{¶ 141} Because agency is a factual determination, NEP urges the Commission to find that each of the five owners at the Apartment Complexes has provided NEP with agency authority to act on behalf of each owner (NEP Initial Br. at 73).

{¶ 142} NEP concludes that it has stepped into the shoes of the landlords at the Apartment Complexes as a matter of law and fact. As the agent of each landlord, NEP is

authorized to act on each landlord's behalf to perform many functions of the landlord, including but not limited to: (1) signing contracts with AEP Ohio and CRES suppliers as agent for the landlord; (2) managing the landlords' accounts with AEP Ohio including receiving and paying bills; (3) sending bills to tenants for electricity usage and receiving payments from tenants; (4) disconnecting electricity to apartments for lack of payment; and (5) addressing and responding to questions from tenants. As it is uncontested in this case that landlords are permitted to perform these activities without being deemed a public utility, NEP asserts that its performance of these activities on behalf of each landlord cannot brand it as acting as a public utility. (NEP Initial Br. at 73-74.)

{¶ 143} Addressing AEP Ohio's claims on why NEP is not an agent, NEP first notes that AEP Ohio cites no legal authority for the proposition that acting as an independent third-party somehow voids a contractual agency relationship. AEP Ohio does not, and cannot according to NEP, argue that NEP operates outside of the agency authority granted by its contracts because that authority, as described above, is sufficiently broad to cover all of NEP's activities. Further, each of AEP Ohio's points about NEP operating independently, in NEP's view, is defeated by the fact that NEP's activities are dependent on a contract between NEP and the landlord, noting that NEP cannot set foot on a property without contractual authorization. Everything NEP does, it argues, is authorized by contract, therefore, it cannot operate "independently." And, to the extent NEP is conducting any activities without the active involvement of landlords, it argues it is doing exactly what those landlords want, as expressed through the agency conferral in the contracts, which is the value of a turnkey solution. (NEP Reply Br. at 33-34.)

{¶ 144} NEP also argues that there is no "special legal status," as AEP Ohio claims, for landlords like there is for attorneys, so none transfers to NEP. NEP notes that the privileges of attorneys are created and governed by law, and the Commission could not create such a concept here without writing new law. NEP believes AEP Ohio's argument is self-defeating here since its status as a regulated public utility is, in fact, a "special legal

status" much more aligned with the attorney analogy, yet it uses agents to perform many of its duties (Tr. I at 169-170). (NEP Reply Br. at 34.)

{¶ 145} NEP further asserts that AEP Ohio's landlord-tenant law arguments should also be ignored because deciding the effect of such law is entirely beyond the Commission's jurisdiction and expertise, which will be addressed further below. Regardless, in response to AEP Ohio's argument about NEP needing to pay five percent on the security deposit it collects, NEP emphasizes that the record is clear that NEP does not charge security deposits, considering Ms. Ringenbach testified that NEP was not and has not collected security deposits at the time she first became employed at NEP in October 2020 (Tr. VI at 1085-86). Further, according to NEP, R.C. 5321.16(A) states that security deposits in excess of 50 dollars or of 1 month's rent, whichever is greater, are entitled to bear interest on the excess only. R.C. 5321.16(A). AEP Ohio, however, presented no evidence regarding whether NEP ever collected a security deposit on behalf of a landlord that would qualify to bear interest under the statute. Moreover, NEP argues that AEP Ohio is similarly misguided in its argument that R.C. 5321.15 generally prohibits landlords from disconnecting utilities. In NEP's view, the statute only prohibits constructive evictions, meaning landlords cannot evict a tenant in Ohio without going through the statutory eviction procedures which includes attempting to evict a tenant by disconnecting the tenant's utilities. On the contrary, a landlord can terminate utility service to enforce a tenant's payment obligation as long as it is not "for the purpose of recovering possession of residential premises." *Sfaelos v. Lamb*, 3d Dist. Hancock No. 5-76-47, 1977 WL 199543, at *3 (June 28, 1977). (NEP Reply Br. at 33-36.)

{¶ 146} NEP argues that, ultimately, AEP Ohio and its agency counterexamples miss the point that the landlords have a right to submeter their properties under the law and that an agent of the landlord does not become a public utility because it is hired by a landlord to submeter the property. Furthermore, NEP argues that AEP Ohio's counterexamples also fail since AEP Ohio authorizes such agency through its LOAs, and AEP Ohio uses agents to conduct its business (NEP Ex. 66; Tr. I at 169-170; NEP Ex. 3, tariff sheet 103-110, tariff sheet

210-211). NEP states that the scope of agency granted to NEP under AEP Ohio's LOA form is as broad as possible, with the following portion of the LOA generally detailing the authorizations granted to a third-party (here, NEP) on behalf of the landlord, "Account Agent and Billing Agent (All activity and transactions, including receiving bills and remitting payments. Billing and correspondence are sent to the Authorized party)" (NEP Ex. 90, Ex. E). According to NEP, AEP Ohio not only recognizes such agency authority but expressly permits agency authority through its LOA and, as such, this grant of agency authority is determinative on this subject. (NEP Reply Br. at 29-33.)

{¶ 147} NEP notes that the Commission is a creature of statute and only has the authority granted to it by the General Assembly. Looking at the Commission's governing statutes, NEP states that the Commission has no authority to dictate or control the services a landlord provides to its tenants or how those services are provided. With respect to landlord-tenant relationships, the General Assembly has enacted a comprehensive set of statutes in R.C. Chapter 5321, which provide tenants recourse to state trial courts for any violations. (NEP Initial Br. at 74 citing *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, (2007) ¶ 51; see R.C. 5321.04 (landlord obligations); R.C. 5321.07 (remedies of tenant); R.C. 5321.12 (allowing for recovery of damages).) NEP highlights that the General Assembly has explicitly stated that R.C. Chapter 5321 is "a statewide and comprehensive legislative enactment regulating all aspects of the landlord-tenant relationship with respect to residential premises." NEP avers that the intent of the General Assembly is unequivocal and that it allows no room for the Commission or AEP Ohio to obstruct decisions made by a landlord as to how to operate its apartment complexes. (NEP Initial Br. at 74; R.C. 5321.20.)

{¶ 148} Related to this point, NEP asserts that AEP Ohio also has no standing to bring landlord-tenant state law claims or arguments before the Commission, pointing to a previous Commission decision stating that "[a] complainant has standing to bring an action under R.C. 4905.26 in a situation where that complainant is directly affected by the alleged unreasonable activity. *In re the Complaint of Citizens Against Clear Cutting, et al. v. Duke Energy*

Ohio, Inc., Case No. 17-2344-EL-CSS, Entry (Mar. 8, 2018), citing *In re the Complaint of Lawrence A. Boros v. The Cleveland Elec. Ilium. Co.*, Case No. 05-1281-EL-CSS, Entry (Jan. 11, 2006), citing *In re the Complaint of National Electrical Contractors Association, Ohio Conference, et al. v. Ohio Edison Company, et al.*, Case No. 98-1400-EL-CSS, Entry (Jan. 28, 1999). As such, NEP argues that AEP Ohio is not a tenant at the Apartment Complexes and is not directly affected by an alleged violation of R.C. Chapter 5321; therefore, ignoring that state courts have jurisdiction over landlord-tenant law, AEP Ohio cannot assert in a complaint or on brief violations of landlord-tenant law against the landlords or NEP as their agent for resolution by the Commission. Further, NEP notes that when the General Assembly addressed disconnection of utilities by a landlord it did so in the landlord-tenant act and not in the public utilities code. (NEP Reply Br. at 61-63.)

{¶ 149} NEP argues that if AEP Ohio can force the Commission to stop landlords from contracting with service providers like NEP, then it will create uncertainty as to the boundary between public utility and customer. This uncertainty could, in turn, deter entry into the market for other behind the meter service providers. For example, NEP gives the example that electricians who wire homes, install equipment, or are involved with energy monitoring systems, among other services, may be hesitant to get involved due to uncertainty as to whether they are legally permitted to perform such services or may run afoul of Commission regulations. NEP avers that a finding in favor of AEP Ohio would blur the line between the line of demarcation between monopoly service and activities that customers may engage in on their own property dealing with their own tenants. (NEP Initial Br. at 74; NEP Ex. 88 at 18, 23; Tr. V at 970.)

{¶ 150} NEP urges the Commission to recognize that it is not the proper authority to arbitrate landlord-tenant disputes. NEP points to the Commission's Opinion and Order in *Brooks*, where the Commission acknowledged this fact, saying that due to its limited resources and statutorily restricted powers, the Commission is "ill-equipped" to insert itself into landlord-tenant disputes. (NEP Initial Br. at 75; *Brooks* at 15.) NEP also submits that the Commission followed this position in *Shroyer*, where the Commission reiterated that it

had no "statutory authority to insert ourselves into the landlord-tenant relationship (NEP Initial Br. at 75; *Shroyer* at 5). In short, NEP avers that the Commission has jurisdiction over the service the landlords take from AEP Ohio, but it does not have jurisdiction over a landlord's decision to hire a company to take on functions that are within the landlord's prerogative or to wade into the landlord-tenant relationship (NEP Initial Br. at 75-76).

{¶ 151} Looking at the *Wingo* decision, NEP notes that the Court itself referred to the issue of submetering as something that should be taken up by the General Assembly to address whether submetering falls within the Commission's jurisdiction. NEP seems to agree with this suggestion but states that, until the General Assembly takes such action, the Commission has no jurisdiction over any of the owners of the Apartment Complexes or NEP. (NEP Initial Br. at 76; *Wingo* at ¶ 25.)

{¶ 152} NEP next attempts to discredit one of AEP Ohio's primary expert witnesses, Mr. Lesser. NEP asserts that AEP Ohio's initial brief and entire case are built upon the testimony of expert witness Steven D. Lesser. NEP believes that the Commission should find his testimony unreliable for the following reasons: bias, failure to consider all necessary facts, and his own admission. Regarding bias, NEP states that Mr. Lesser is currently counsel at Benesch Friedlander Coplan and Aranoff, which is the same law firm that represents Duke Energy Ohio, Inc. in a "copy-cat" complaint case against NEP, and NEP asserts that attorneys in the same energy practice group as Mr. Lesser in the Benesch Columbus, Ohio offices represent Duke (Tr. I at 13-15; *In re Duke Energy Ohio, Inc. v. Nationwide Energy Partners, LLC*, Case No. 22-279-EL-CSS, Complaint (Mar. 30, 2022). According to NEP, the fact that AEP Ohio and Duke entered into a joint defense agreement that requires AEP Ohio and Duke to have identical legal interests should alone be sufficient evidence of Mr. Lesser's bias. Mr. Lesser and his law firm, argues NEP, will benefit from his testimony that seeks to justify AEP Ohio's practice of not allowing multi-family property conversions, which is exactly what Duke is asking for through its separate complaint at the Commission. Therefore, Mr. Lesser's bias is a valid consideration of the Commission if it elects to take Mr. Lesser's testimony into consideration. (NEP Reply Br. at 50-51.)

{¶ 153} NEP also argues that the Commission cannot rely on Mr. Lesser's testimony because he failed to consider all relevant facts in his analysis. First, according to NEP, Mr. Lesser did not review or consider the Amendment and Supplement to MIA and CCSA, which stated that the landlord owned the Meter Equipment. NEP emphasizes that despite being confronted with this fact, he chose not to revise his testimony. (NEP Ex. G at G-42-44, G-84-85, G-128-130, G-172-174, G-217-219; Tr. I at 40-42.) Second, Mr. Lesser also did not review or consider the AEP Ohio LOAs prepared for each of the Apartment Complexes, which granted NEP agency authority that, NEP argues, is as broad as possible (Tr. I at 44). Third, Mr. Lesser did not consider AEP Ohio's customer of record at the five Apartment Complexes (Tr. I at 47). According to NEP, Mr. Lesser's failure to review and consider these items renders his testimony unreliable. (NEP Reply Br. at 51-53.)

{¶ 154} Further, NEP asserts that Mr. Lesser admitted that it would be speculative to determine that NEP was a public utility if any one of the activities in his analysis was incorrect, yet, as set forth above, there were a number of factors that Mr. Lesser did not consider but were incorrect; therefore, the Commission should deem his testimony speculative and unreliable (Tr. I at 117-122; NEP Reply Br. at 54).

{¶ 155} At hearing, Mr. Lesser stated that he was not an expert on landlord-tenant law, which makes any assertions related to that point, in NEP's eyes, a lay opinion and not expert testimony (Tr. Vol. I at 65-66). Further eroding his credibility, asserts NEP, is that his "follow the money" principle directly conflicts with his "substance over form" principle in that NEP and the landlords that hire it could structure their business arrangements any way they want—they are, after all, private businesses with freedom to contract. Also at hearing, NEP believes that, significantly, Mr. Lesser testified that he could not analyze NEP's business model if even one element of it changed; that he could not determine whether any one of NEP's business practices, on its own, rendered it a public utility; that he could not provide any guidance on what NEP could stop doing to comply with his view of the law (Tr. I at 121-122). According to NEP, NEP's "totality of the circumstances" analysis offers no tipping point, no cut-off, at which point a company becomes a public utility and offers

no way for the Commission to adopt his analysis without subjectively writing its own jurisdictional statutes and choosing over which industries it desires to exercise jurisdiction. Under his analysis, NEP asserts that if it changed even one part of its business, this case would need to be relitigated to assess whether the "totality of the circumstances" had changed. Accordingly, this analysis, from NEP's perspective, would destroy regulatory certainty for Ohio businesses and would be untenable for the Commission to adopt and apply. (NEP Reply Br. at 54-56.)

{¶ 156} NEP next turns to AEP Ohio's assertion of customer harm, noting that AEP Ohio spends a considerable amount of its brief discussing the alleged harms that may befall customers when they switch to submetered service, yet, NEP argues, customer harms are not relevant to the Commission's inquiry into whether NEP is a public utility. NEP asserts that the Supreme Court of Ohio, the Commission, and the attorney examiners have all indicated that quantifying harm is not an appropriate method to determine if the Commission has jurisdiction over NEP's activities. *Wingo* at ¶ 24; Case No. 21-990-EL-CSS, Entry (July 27, 2022) at ¶ 54; Entry (May 6, 2022) at ¶¶ 33-34). Further, NEP notes that AEP Ohio references R.C. 1.49 if the Commission determines R.C. 4905.03(C) to be ambiguous, but AEP Ohio's own witness testified that "the Commission is fully capable of resolving this case under the plain language of the statute, because that language is clear and unambiguous" (AEP Ohio Ex. 1 at 17). NEP argues that the Supreme Court of Ohio has not indicated that R.C. 4905.03(C) is ambiguous and has directed the Commission to apply that statute's plain language to determine if a company is a public utility. *Wingo* at ¶ 26. Also, NEP argues that AEP Ohio failed to produce any evidence that the alleged harms, in fact, occurred at the Apartment Complexes and, instead, speculated as to possible harms that could potentially occur at some point in the future at the Apartment Complexes. (NEP Reply Br. at 56-58.)

{¶ 157} NEP asserts that AEP Ohio seeks to expand the scope and evidentiary record of this case beyond the Apartment Complexes to support its "impersonation test": by discussing the types of equipment NEP installs for its customers at properties in AEP Ohio's

service territories, discussing both primary and secondary master-meter service configurations even though the Apartment Complexes are served by secondary configurations, referencing contractual provisions that no longer are applicable, and discussing security deposits even though NEP no longer collects them (Tr. VI at 1085). NEP argues that the Commission should not consider such extraneous information. (NEP Reply Br. at 60.)

{¶ 158} Finally, NEP also addresses AEP Ohio's claim that, if the Commission finds in AEP Ohio's favor, the Apartment Complexes must automatically be converted back to individual meters served directly by AEP Ohio. However, NEP argues that this decision is not within the Commission's power. According to NEP, since the landlord can submeter, to require them to switch back to individual meters would violate that right and insert the Commission into the lease agreements between the landlords and their tenants. NEP highlights that Mr. Williams agreed at hearing that the decision of whether to reconvert rests with the landlords regardless of the outcome of this case (Tr. II at 396-397 - CONFIDENTIAL). NEP concludes that, even if AEP Ohio prevails in this proceeding, it must permit the Apartment Complexes to use master meters as long as AEP Ohio's customers, the property owners, continue to want to do so because AEP Ohio's tariff expressly provides that landlords can take service through a single meter for the entire complex (NEP Ex. 5 at ¶21; NEP Ex. 3 at ¶ 18). (NEP Reply Br. at 64-66.)

b. Count II—Whether NEP's Operations at the Apartment Complexes Violates AEP Ohio's Certified Territory under R.C. 4933.83(A)?

i. AEP OHIO

{¶ 159} AEP Ohio asserts that by supplying or arranging for the supply of retail electric service to the Apartment Complexes, 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 AEP Ohio's certified territory under R.C. 4933.83(A). AEP Ohio states that competition for noncompetitive wires service clearly goes against the structure and intent of R.C Title 49.

AEP Ohio witness Lesser set forth the details of NEP's provision of service in support of the CTA violation. (AEP Ohio Reply Br. at 38; AEP Ohio Ex. 1 at 5-9, 22, 27-28, 31, 94-95.)

{¶ 160} Regarding NEP's contention that its activities behind-the-meter are beyond the reach of the CTA, AEP Ohio argues that this position is based upon a flawed statutory analysis and misguided policy analysis by NEP witness Centolella. A key premise in NEP's position is that its activities are conducted entirely behind-the-meter. AEP Ohio contends, however, that the record shows that NEP operates by offering and providing retail electric service to tenants, which involves much more than physically delivering electricity through equipment behind the landlord's master meter. AEP Ohio recounts that NEP performs marketing, solicitation, billing, customer service operations, back-office operations, disconnections for nonpayment, and engineering services, all separate and apart from the landlord's premises. Thus, as an initial matter, AEP Ohio disregards NEP's contention that all of its activities are on the landlord's side of the meter. AEP Ohio further states that NEP's attempt to reconcile the Commission's application of R.C. 4905.03(C) and the CTA is flawed since the analysis combines different terms from different statutes and contexts. (AEP Ohio Reply Br. at 39-40.)

{¶ 161} AEP Ohio recounts NEP's three primary arguments concerning its defense against Count II: (1) the master meter is a hard barrier to the Commission exercising jurisdiction over NEP's "behind the meter" activities because the CTA says electric suppliers have the exclusive right to deliver power "to," not "within" an electric load center, (2) the reference in R.C. 4928.01(A)'s definition of "electric utility" to an entity having a certified territory under the CTA means that NEP cannot be a public utility since it does not have a certified territory, and (3) additional policy considerations support NEP's position. (AEP Ohio Reply Br. at 41.)

{¶ 162} AEP Ohio calls NEP's argument that the CTA only gives electric suppliers with certified territories a right to provide service "to" electric loads and not "within" electric loads to be circular. As an initial matter, AEP Ohio disagrees with NEP's contention

that a finding against NEP in this case would mean that all landlords using master-meter configuration are violating the CTA and AEP Ohio's tariff – as with most points of contention, AEP Ohio again stresses that NEP is operating a new "big business, third-party" submetering operation that is far different than the landlord-tenant exception to R.C. 4905.03. AEP Ohio avers that its tariff is written to account for potential changes of Ohio law over time. According to AEP Ohio, the *Wingo* remand left a gap in the law, which the Court remanded back to the Commission to attempt to fill. Thus, AEP Ohio finds NEP's reliance on the Commission's decision in *Brooks*—that third-party submetering is beyond the Commission's reach as a behind-the-meter activity of the landlord—to be unreconcilable with the Court's directive in the *Wingo* remand. (AEP Ohio Initial Br. at 147-148; AEP Ohio Reply Br. at 42.)

{¶ 163} The Supreme Court of Ohio in *Wingo* identified that NEP and similar "big business," "third-party" submetering companies present a new situation not addressed by previous submetering caselaw. In earlier cases, landlords were reselling electricity to consumers as an incidental part of being a property owner, not as an independent third-party submetering company. Based upon the *Wingo* remand, AEP Ohio is asking the Commission to apply the facts of NEP's business model to the statutory definition of a public utility. AEP Ohio, therefore, sees no threat to the long-established landlord-tenant exception, if NEP is found to be operating as a public utility. (AEP Ohio Reply Br. at 43.)

{¶ 164} AEP Ohio avers that NEP's position that behind-the-meter activity is beyond the jurisdiction of the Commission and the CTA is wrong because it conflicts with CTA caselaw and underlying statutory provisions. AEP Ohio asserts that the tenant load at the Apartment Complexes has been served by AEP Ohio historically and that fact alone qualifies it as an electric load center under the CTA. Further, AEP Ohio states that the Supreme Court of Ohio has affirmed the Commission's clarification of "electric-consuming facilities" to mean "buildings, structures, installations, or other man-made improvements that are served by electricity." (AEP Ohio Reply Br. at 43-44; *Union Rural*.) As the Commission has applied those provisions, the utility that has a right to serve new loads

straddling multiple utilities' territories is the one whose territory contains the largest area of buildings, installations, and other "electric-consuming facilities." Therefore, NEP's position that the Commission can look no further than the metering point, would be at odds with cases such as *Union Rural*, where the Commission did examine behind-the-meter activities – an approach that was affirmed by the Supreme Court of Ohio. (AEP Ohio Reply Br. at 44-45.)

{¶ 165} NEP argues that the reference in R.C. 4928.01(A) to a certified territory and the provision of non-competitive service in the definition of "electric utility" means that NEP is not a public utility because such an interpretation "would create irreconcilable conflicts between different chapters of the Revised Code." (NEP Initial Br. at 48.) However, AEP Ohio asserts that many of the terms in R.C. Title 49 are "similar but different in various ways and used in different contexts to mean different things," particularly in the context of R.C. Chapter 4928. AEP Ohio counters that no conflict exists because NEP's argument that it is excluded from the utility definition because it does not have a certified territory results from a misunderstanding of the statute. AEP Ohio explains that "electric utility" is a term only used in R.C. Chapter 4928 and that R.C. 4928.01(A) indicates that the defined terms are created to be "as used in this Chapter" and are not for all of R.C. Title 49. Regardless, AEP Ohio submits that the definition of "electric utility" shows that NEP is incorrect in claiming that the reference to a certified territory undercuts AEP Ohio's position that NEP is an "electric light company." NEP says that the General Assembly's use of the phrase "electric light company that has a certified territory" in the definition of "electric utility" in R.C. 4928.01(A), supports a conclusion that not all electric light companies have a certified territory. Otherwise, AEP Ohio asserts, if every electric light company had a certified territory, the General Assembly's use of that additional phrase lacks meaning and would be a legal nullity. Thus, the unique definition of "electric utility" that is only used in R.C. Chapter 4928 makes sense in context and does not undercut AEP Ohio's Complaint. (AEP Ohio Initial Br. at 46-47.)

{¶ 166} By contrast, the CTA terms supporting AEP Ohio's claims are explicitly defined for purposes of R.C. Chapter 4928 the same as the CTA itself and without any modification. Specifically, R.C. 4928.01(A)(8) provides that even for purposes of R.C. Chapter 4928 the term "electric load center" "has the same meaning as in section 4933.81 of the Revised Code" and R.C. 4928.01(A)(9) also provides that "electric supplier" has "the same meaning as in section 4933.81 of the Revised Code." This similarity in language reduces any significance to R.C. 4928.01(A)'s reference to certified territory in defining "electric utility" for purposes of R.C. Chapter 4928. AEP Ohio asserts that NEP ignores the definition of "electric light company" in R.C. 4928.01(A)(7) that actually does create an implication for this case. According to AEP Ohio, that section provides that for purposes of R.C. Chapter 4928 that term "has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises." This definition of the key term in this complaint case supports AEP Ohio's view that NEP operates as an "electric light company." AEP Ohio argues that this definition creates a special exception from the definition of an "electric light company" for a self-generator that sells electricity for resale. (AEP Ohio Reply Br. at 48.)

{¶ 167} AEP Ohio counters that in an attempt to advance its arguments concerning the master meter being the "point of demarcation," NEP actually exposes three major flaws in NEP's policy positions. First, AEP Ohio asserts that NEP incorrectly considers only the landlord a consumer and never considers the tenants' interests. Second, although NEP claims that the Commission asserting jurisdiction here will interfere with customers' choice of service providers, AEP Ohio argues that NEP is the entity that actually restricts customer choice. AEP Ohio points out that after conversion to master-meter service, tenants lose a number of options and protections that AEP Ohio is required to provide, such as a right to shop for competitive retail electric supply service. Third, the customer harms identified by AEP Ohio in its initial brief (pgs. 121-131) support its position that NEP's actions violate the

purpose and intent of those statutes. These statutory-based policies and customer harms should be of "paramount consideration" in the Commission's decisions. (AEP Ohio Reply Br. at 49-51.)

ii. NEP

{¶ 168} NEP asserts that AEP Ohio does not address its Count II in its initial brief and, instead, relies upon the Commission's determination of Count I. NEP asserts that it is not an electric light company and, therefore, it cannot violate the CTA's prohibition that an electric light company cannot serve customers in another electric light company's exclusive service territory. (NEP Initial Br. at 76-77; NEP Reply Br. at 70.)

{¶ 169} Additionally, NEP reiterates that services provided on a landlord's side of the utility meter and on the landlord's property cannot violate the CTA (NEP Initial Br. at 77).

{¶ 170} NEP further states that AEP Ohio's Count II fails because (1) NEP is not an electric company; and (2) the record establishes that all of NEP's services are provided on the landowner's property and property behind the utility meter (NEP Initial Br. at 77).

c. Count III—Whether 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)?

i. AEP OHIO

{¶ 171} AEP Ohio argues that R.C. 4928.08(B) prohibits the provision of a competitive component of retail electric service without first obtaining certification from the Commission to provide such service. According to AEP Ohio, NEP has not obtained from the Commission certification to supply a competitive component of retail electric service. By supplying or arranging for the supply of a competitive retail electric service to the Apartment Complexes without the required certification or complying with the attendant

regulations (e.g., all of the requirements of Ohio Adm. Code Chapters 4901:1-21), NEP is violating R.C. 4928.08(B). (AEP Ohio Reply Br. at 51.)

{¶ 172} AEP Ohio explains that the Commission's rules concerning competitive retail electric service includes "power brokers." Ohio Adm.Code 4901:1-24-01(T) further defines "power brokerage" as "assuming the contractual and legal responsibility for the sale and/or arrangement for the supply of retail electric generation service to a retail customer in this state without taking title to the electric power supplied." AEP Ohio first points out that NEP repeatedly stresses that it "does not take title to electricity." NEP denies acting as a CRES because another aggregator or broker is the ultimate decision maker for its customers. In response to NEP's argument that it cannot be considered a CRES provider because the tenants are not consumers, AEP Ohio responds that the cited *FirstEnergy* and *Brooks* cases were issued decades before *Wingo* and only applied to landlords not acting as a public utility. AEP Ohio asserts that the premise of those decisions is now inapplicable, as NEP is acting as a public utility. (AEP Ohio Reply Br. at 51-52.)

{¶ 173} Even more telling, however, AEP Ohio avers that NEP does arrange for the supply of competitive retail generation service. Pointing to the contracts with landlords, AEP Ohio notes that the landlords give NEP unrestrained authority to a choose a generation supplier for the master meter, and NEP may unilaterally choose whether to shop or use the AEP Ohio standard service offer. In turn, AEP Ohio states that the landlord completely relinquishes any discretion on this issue, pursuant to Section 1.3.3 of the CCSA. Based on the record, the Commission should find, consistent with Count III of AEP Ohio's Complaint, that NEP arranges for the supply of competitive retail electric service without the required certification, as set forth in Count III of AEP Ohio's Complaint, in violation of R.C. 4928.08(B). (AEP Ohio Reply Br. at 52-54; NEP Ex. G at G-8-9.)

ii. NEP

{¶ 174} NEP argues that AEP Ohio's Count III for unlawful provision of competitive retail electric service is also derivative of Count I and also based on NEP being a public utility. For the same reasons outlined throughout its initial brief, NEP reiterates that it is not a public utility and, therefore, Count III should also be dismissed. (NEP Initial Br. at 78.) Also, NEP also argues that AEP Ohio waived Count III of its Complaint, noting that a complainant abandons a claim when it fails to present any evidence or case law in support or otherwise address that claim in applicable briefing. *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St. 3d 162, 2020-Ohio-5221, 164 N.E.3d 425, ¶ 59; cf. *Abdulsalaam v. Franklin Cty. Bd. of Commrs*, 637 F.Supp.2d 561, 578, citing *Dage v. Time Warner Cable*, 395 F.Supp.2d 668, 679 (S.D. Ohio 2005). According to NEP, AEP Ohio did not present any evidence or argument regarding Count III in its initial brief and did not even request judgment in its favor on Count III; therefore, that count must be dismissed. (NEP Reply Br. at 71.)

{¶ 175} NEP asserts that it is not an "electric services company" which engages "in the business of supplying or arranging for the supply of only a competitive retail electric service in this state," as the term is defined in R.C. 4928.01(A)(9). NEP states that no evidence in the record exists showing that NEP supplies a competitive retail electric service nor that it arranges for the supply of such service. NEP does have authority, under its contracts with each landlord, to enlist the service of brokers and aggregators for a property, but NEP has no legal or contractual obligation to sell or arrange for the supply of retail electric generation service. To the extent that a property owner desires to procure supply from a competitive retail supplier, the owner uses a Commission-approved aggregator and broker to assist in the process. Based on the foregoing, NEP submits that it is not supplying or arranging for the supply of a competitive service at the Apartment Complexes, and the Commission cannot find NEP to be in violation of R.C. 4928.08(B). (NEP Initial Br. at 78-79; NEP Ex. 90 at 41-42.)

d. Miller Act and the Stay Entry

i. AEP OHIO

{¶ 176} Even if the Commission does not determine that NEP is operating as a public utility, AEP Ohio argues that the Commission should decide whether the conversions of the Apartment Complexes were reasonable under the Miller Act. AEP Ohio reasons that the current Stay Entry is only temporary until this case concludes; therefore, consideration of whether such conversion violates the Miller Act must be undertaken to determine if service should be abandoned on a permanent basis. Under the Miller Act, no public utility shall abandon or be required to abandon or withdraw any electric light line or any portion thereof or the service rendered thereby without holding a hearing to ascertain the facts and determining that the proposed abandonment is reasonable, having due regard for the welfare of the public and the cost of the operating facility. R.C. 4905.20; R.C. 4905.21. According to AEP Ohio, the Miller Act also applies to the abandonment or withdrawal of services from individual customer service lines. *State ex rel. Toledo Edison Co. v. City of Clyde*, 76 Ohio St. 3d 508, 516, 1996-Ohio-376, 668 N.E.2d 498 (citing *State ex rel. Klapp*, 10 Ohio St.2d 14, 225 N.E.2d 230 (1967)). As already detailed above when describing how the conversions take place, AEP Ohio argues that the conversions of the Apartment Complexes to master-metered service will result in the abandonment or withdrawal of electric light lines serving the residents at the Apartment Complexes and the services rendered by those lines. Under the Miller Act, AEP Ohio argues that it should not be required to abandon its service to the tenants because those tenants lose out on the numerous statutory and regulatory protections afforded under Ohio law, as detailed more specifically above, to the customers of electric light companies. (AEP Ohio Initial Br. at 132-134.)

ii. NEP

{¶ 177} NEP states that, as an initial matter, AEP Ohio's Miller Act argument should be dismissed because it did not appear in AEP Ohio's Complaint, and AEP Ohio did not file an abandonment application with the Commission regarding the Apartment Complexes.

NEP further notes that AEP Ohio's Complaint contained three counts, none of which asserted a Miller Act claim, and that the Miller Act was referenced once, in Paragraph 4 of AEP Ohio's Complaint as an example "of the regulatory compact" (Complaint at ¶ 4). To put a fine point on its argument, NEP states that AEP Ohio's expert witness at hearing was unaware of whether AEP Ohio filed an application for abandonment at the Apartment Complexes (Tr. I at 69-70). (NEP Reply Br. at 66-70.)

{¶ 178} Among other arguments, NEP asserts that the issue of the Stay Entry is moot, noting that AEP Ohio's August 26, 2022 application for rehearing on the matter, which addresses the same arguments AEP Ohio presents again here, was denied by operation of law pursuant to R.C. 4903.10 (NEP Reply Br. at 90-94).

2. COMMISSION CONCLUSION

{¶ 179} Based upon review of the record, the parties' briefs, and the applicable law, the Commission finds that 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). Consequently, under the circumstances of this case, the Commission does not have jurisdiction to regulate NEP and its activities at the Apartment Complexes. Additionally, as will be further described below, we direct AEP Ohio to file an application to modify its electric service resale tariff to include certain provisions related to landlords engaging in resale of electricity to tenants.

{¶ 180} First, we find no merit in AEP Ohio's argument that, in *Wingo*, the Supreme Court of Ohio recognized the existence of big-business, third-party submetering companies as a distinct factual scenario related to a landlord reselling electricity to tenants thus leaving a gap in existing law regarding the Commission's jurisdiction over such submetering

companies.[2] When the case upon which *Wingo* is based was before the Commission, we found that NEP was not a public utility and subject to our jurisdiction after applying the modified *Shroyer* test to NEP's operations at a specific apartment complex. *In re the Complaint of Cynthia Wingo v. Nationwide Energy Partners, LLC, et al.*, Case No. 17-2002-EL-CSS, Finding and Order (Oct. 24, 2018) at ¶ 78. On appeal, the Supreme Court of Ohio reversed the Commission's decision and abrogated the modified *Shroyer* test since it had no connection to the statutory language that defines the Commission's jurisdiction, thus remanding the case back to the Commission for further consideration. *Wingo* at ¶¶ 24, 26. The Court's decision and remand did not create a gap in existing law regarding landlords reselling electricity to tenants and a third-party submetering company's role in that relationship, it simply nullified the means we used to reach our end conclusion in the complaint case, that NEP did not fall under our jurisdiction in that specific circumstance. As such, the Court remanded the case back to us to use different means to reach a conclusion, by applying the language of 4905.03(C). AEP Ohio focuses on the Court's description of submetering as a "big business" where "third-party resellers such as NEP" make large profits by serving multiple properties and landlords, and the Court's recognition that these businesses did not exist when the statute was enacted. *Wingo* at ¶¶ 3, 25. We believe the Court was simply giving background information on NEP when it made these statements. In fact, the majority of the language regarding the type of business NEP operates appears in the "Background" section of the Court's decision. *Wingo* at ¶ 3. Further, the Court cites two unrelated cases, NEP's own website, and a newspaper article as the sources from which it garnered the information. *Wingo* at ¶ 3, footnote 1. Accordingly, we find no merit in AEP Ohio's argument that the decision in *Wingo* resulted in a "sea change" in law related to submetering (AEP Ohio Ex. 1 at 12).

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[2] We recognize that *Wingo* did leave open the question of whether NEP qualified as a public utility; therefore, generally and as discussed in more detail below concerning NEP's counterclaims, AEP Ohio's actions pertaining to the Apartment Complexes resulting from this open question do not rise to a level sufficient for us to determine it violated R.C. 4905.26 and 4905.35, as alleged by NEP.

{¶ 181} In *Wingo*, the Court remanded the case back to the Commission for further consideration, stating:

> Thus, we remand this case for the PUCO to determine whether it has jurisdiction based upon the jurisdictional statute, not the modified *Shroyer* test. In doing so, the PUCO will need to apply R.C. 4905.03 and determine whether NEP is an "electric light company," "water-works company," or "sewage disposal system company" "in the business of supplying" any of the covered services. Of particular significance in this inquiry are the meanings of the terms "electric light company," "water-works company," and "sewage disposal system company," "in the business of" and "supplying," and the application of those terms to the facts of the case. The application of the relevant legal standards to the facts is one that is best left to the PUCO in the first instance.

Wingo at ¶ 26. After remand, we ultimately dismissed that case by granting a voluntary dismissal filed by the complainant. *In re the Complaint of Cynthia Wingo v. Nationwide Energy Partners, LLC, et al.*, Case No. 17-2002-EL-CSS, Entry (July 14, 2021). Nevertheless, we follow the Court's same instructions from *Wingo* in this matter and apply the plain language of R.C. 4905.03(C) to NEP's activities at the Apartment Complexes and reach the conclusion that we do not have jurisdiction to regulate NEP's operations at the Apartment Complexes.

a. Count I—Whether NEP Acts as an "Electric Light Company" Under R.C. 4905.03(C) And, Thus, a "Public Utility" Under R.C. 4905.02(A)?

{¶ 182} The Commission finds that AEP Ohio has not met its burden of proving that NEP is acting as an electric light company according to the plain language of R.C. 4905.03(C). We agree with NEP that, under current law, the landlords of the Apartment Complexes are the "consumers" under R.C. 4905.03(C) engaged in resale of electricity through contractual arrangements (leases) with their tenants, as permitted under law and AEP Ohio's tariff. 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.

{¶ 183} R.C. 4905.03(C) states that an entity is an electric light company when "engaged in the business of supplying electricity * * * to consumers within this state." Applying this statute to NEP's activities at the Apartment Complexes, we find that NEP is not serving as an electric light company and, therefore, is not a public utility for multiple reasons.

i. "CONSUMER"

{¶ 184} First, 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. It is undisputed that the landlords own the properties upon which the Apartment Complexes sit (Ex. G; AEP Ohio Initial Br. at 56). It also is undisputed that the property owners of the Apartment Complexes each entered into contracts (the CCSAs) with NEP in August and September 2020 as well as an MIA (NEP Ex. 90 at 20-22, Ex. G; AEP Ohio Ex. 1 at 2, SDL-1). They also entered into an Addendum to the CCSA and Amendment to the MIA for each of the Apartment Complexes in October 2020 (NEP Ex. 90 at 20-22, Ex. G at G-2, 48, 87, 134, 176; AEP Ohio Ex. 1 at 2, SDL-1). Additionally, they each executed an Amendment and Supplement to MIA and CCSA in Spring of 2022 (NEP Ex. 90 at 20-22, Ex. G at G-42, 84, 128, 172, 217; AEP Ohio Ex. 1 at 2, SDL-1; Jt. Ex. 1).

{¶ 185} We note that, on September 18, 2020, NEP contacted AEP Ohio on behalf of the property owners to notify AEP Ohio of the request to convert the Apartment Complexes to master-meter service (NEP Ex. 91 at 4). NEP submitted work orders to AEP Ohio regarding the specific conversions in October of 2020 (NEP Ex. 91 at 4; NEP Ex. 16; Tr. VII at 1246, 1250-1252). NEP also sent AEP Ohio executed copies of AEP Ohio's LOAs signed by NEP and the property owners as well as specific details concerning the construction jobs

(NEP Ex. 90 at 16, Ex. E; Tr. VII at 1248-1251). After AEP Ohio denied the work orders submitted by NEP on behalf of the property owners in September 2021, the property owners themselves sent conversion requests for the Apartment Complexes to AEP Ohio in October of 2021 through AEP Ohio's online portal that accepts requests of that nature (NEP Ex. 91 at 7, Ex. E).

{¶ 186} AEP Ohio's tariff allows for submetering by landlords where the landlord purchases service from AEP Ohio through a master meter at a general service level if the landlord is not engaged in unlawful resale. (AEP Ohio Initial Br. at 21, 160; AEP Ohio Ex. 2 at 3-5, Ex. JLM-1; NEP Ex. 90 at 30-31, 45-47, Ex. L, Ex. M).

{¶ 187} Also, the landlords at the Apartment Complexes require each of the tenants to agree to receive electric service resold by the landlord through a submeter to their apartments. The applicable lease language states, in part, that the landlord "* * * shall secure and resell to Lessee, and Lessee shall promptly pay all charges incurred for * * * electricity * * *" (NEP Ex. 90 at 10, Ex. G at G-14 (CCSA 4.4.1), G-58, 100, 145, and 189).

{¶ 188} Having set forth the evidence in the record pertinent to this part of the discussion, we now turn to an examination of precedent related to the term "consumer" under R.C. 4905.03(C). We conclude that, 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. The first instance where the Court determined that a particular landlord was not a public utility when it engaged in reselling electricity to a tenant occurred in *Jonas v. Swetland Co.*, 119 Ohio St. 12, 16, 162 N.E. 45, 46 (1928). In that decision, the Court held that, "[t]here being no evidence in the record that the realty company had dedicated its property to the public service, nor had been willing to sell current to the public * * * the Swetland Company is not a public utility." *Jonas v. Swetland Co.*, 119 Ohio St. 12, 16, 162 N.E. 45, 46 (1928).

{¶ 189} Since that time, both the Court and Commission have addressed whether the landlord or the tenant is the "consumer" as set forth in R.C. 4905.03(C). In 1965, the

Supreme Court of Ohio decided a case regarding whether the Commission had jurisdiction over a public utility when that utility sold electricity to a landlord who then resold the electricity through submetering to its tenants. *Shopping Centers* at 1-5. The Court determined that the Commission did have jurisdiction over such public utility because the landlord was the consumer under R.C. 4905.03(C) (at that time, R.C. 4905.03(A)(4), which consisted of the same applicable statutory language), stating "* * * we see no good reason why office buildings, apartment houses and shopping centers, which use electric energy in their own operations, cannot fairly be classed as 'consumers' * * * even though by submetering these institutions resell a part of such electric energy to others connected with them in a business way." *Shopping Centers* at 4.

{¶ 190} In 1996, the Commission determined that The Toledo Edison Company had no authority to prohibit certain aspects of resale or redistribution of electric service from a landlord to its tenants "* * * where the landlord is not operating as a public utility, and the landlord owns the property upon which such resale or redistribution takes place." *Brooks*, Opinion and Order (May 8, 1996) at 13. The Commission also stated that "*Shopping Centers* does not, however, require this Commission to take the further step of attempting to regulate arrangements between non-utility landlords * * * and the landlords' tenants[.]" *Brooks* at 14. The Commission further reasoned that, "* * * this Commission's jurisdiction extends to the regulation of Toledo Edison and its relationships with its customers, [the landlord]. Our jurisdiction is not, however, extended beyond the public utility/customer relationship merely by the inclusion of a provision in the utility's tariff which seeks to reach beyond such relationship. To conclude otherwise would mean that the Commission's jurisdiction may be controlled by the very utilities this Commission is charged with regulating, rather than Ohio statute." *Brooks* at 14.

{¶ 191} In 2001, the Commission affirmed the reasoning above in *Brooks* in a case related to FirstEnergy's transition to implement electric restructuring pursuant to Am.Sub. S.B. 3, which enacted R.C. Chapter 4928. *S.B. 3 Case*, Entry (Jan. 18, 2001). The Commission found that the new law did not change the rationale articulated in *Brooks*, that redistribution

or resale of electricity by a landlord to its tenants is a matter of landlord tenant relations and does not fall within the Commission's jurisdiction. *S.B. 3 Case* at ¶ 3. The Commission further stated that "SB3 does not change the Commission's conclusion that, in these circumstances, the landlord is the customer of the electric utility and any electric service company providing generation service." *S.B. 3 Case* at ¶ 3.

{¶ 192} In 2002, the Supreme Court of Ohio addressed an appeal of the *S.B. 3 Case*, which involved a claim asserting that the Commission erred in holding *Brooks* to be controlling since S.B. 3 was enacted after the *Brooks* decision. *FirstEnergy*, 775 N.E.2d 485 (2002). The Court affirmed the Commission's decision in *Brooks* and the *S.B. 3 Case*, stating "this court has held that office buildings, apartment houses, and shopping centers are 'consumers' of electricity even though these consumers may resell, redistribute, or submeter part of the electric energy to their tenants * * * S.B.3 did not change the law governing the resale or redistribution of electric service by a landlord to its tenants, and nothing in S.B. 3 overrules *Jonas, Shopping Centers Assn.*, or the commission's decision in *Brooks* (which relied on *Shopping Centers Assn.*)." *FirstEnergy* at ¶ 9. The Court further noted that, in talking about S.B. 3, "* * * the commission's decision simply affirmed the right of landlords and tenants to enter into lease agreements that appoint the landlord to secure, resell, and redistribute electric service to its tenants. Under such leases, agreed to by tenants, the tenants exercise choice by appointing their landlord to make decisions and arrangements concerning electric utility service." *FirstEnergy* at ¶ 10.

{¶ 193} In 2006, the Court provided definitive clarification regarding the issue of whether the landlord or the tenant is the "consumer" as set forth in R.C. 4905.03(C). In a case concerning a landlord submetering water service to tenants, the Court relied on *FirstEnergy* to reach its holding, stating that "[a]pplying *FirstEnergy* to the case at bar, we hold that the landlord is the consumer of these services, even though it resold the services to its tenants." *Pledger* at ¶ 38. In reaching this conclusion, the Court reasoned that, "* * * none of the authorities that appellant cites, whether dictionary definitions, case law, or statutory definitions, supports the assertion that in a landlord-tenant relationship, it is the

tenant rather than the landlord who is the consumer of the commodity provided by a water-works utility. The PUCO's position that the landlord is the 'consumer' under R.C. 4905.03(A)(8) is better reasoned and is supported by legal authority." *Pledger* at ¶¶ 35-36. Although *Pledger* involved determining whether a landlord was a "water-works company" when submetering water service to tenants, notably, the relevant parts of the definition of a water-works company under R.C. 4905.03(A)(8), "*engaged in the business of supplying* water through pipes or tubing, or in a similar manner, *to consumers within this state*," are the same as the definition of electric light company in R.C. 4905.03(C). R.C. 4905.03(G) (Emphasis added). And, significantly, the Court relied on *FirstEnergy*, a case pertaining to a landlord submetering electric service, to reach its conclusion regarding the term "consumer." *Pledger* at ¶¶ 37-39.

{¶ 194} As such, contrary to AEP Ohio's claims otherwise, a landlord who is not operating as a public utility that redistributes or resells electric service through submetering to its tenants is the ultimate consumer contemplated under R.C. 4905.03(C). Except as noted further below regarding the Commission requiring provisions be placed in a tariff to ensure consumer protections, the Commission's jurisdiction ends at this point and does not extend to a landlord's reselling of that electricity to its tenants. As noted by the Court in *FirstEnergy*, the lease agreement appoints "* * * the landlord to secure, resell, and redistribute electric service to its tenants. Under such leases, agreed to by tenants, the tenants exercise choice by appointing their landlord to make decisions and arrangements concerning electric utility service." *FirstEnergy* at ¶ 10. 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 (NEP Ex. 90 at 10, Ex. G at G-14 (CCSA 4.4.1), G-58, 100, 145, and 189). As to any argument that the contractual arrangement between the landlords and NEP and the nature of NEP's operations at the Apartment Complexes somehow results in each landlord operating as a "public utility," thus possibly casting doubt on the conclusion that the

landlord is the consumer, we note that this argument tact has no merit and will be addressed below when conducting other aspects of the statutory analysis under R.C. 4905.03(C).

{¶ 195} In response to AEP Ohio's argument that a remand would have been pointless if precedent had already determined the landlord is the "consumer," we note that the Court explicitly stated in the *Wingo* decision that "[t]he application of the relevant legal standards to the facts is one that is best left to the PUCO in the first instance." *Wingo* at ¶ 26. Thus, the Commission was tasked with establishing a factual record (i.e., determining that a submetering arrangement existed at the subject complex through which the landlord engaged in resale to tenants, that the landlord hired NEP, etc.) after which, and only after which, we could then make legal conclusions, such as potentially finding that the specific landlord in that case qualified as the "consumer" under R.C. 4905.03(C). Furthermore, prior to deciding *Wingo*, the Court partially granted a motion to dismiss, thereby striking from consideration in its ultimate decision Ms. Wingo's proposition of law that "[s]ufficient evidence exists to find that NEP is a 'public utility.'" *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 157 Ohio St.3d 1518, 2019-Ohio-5289, 136 N.E.3d 522 (2019); see *Wingo* at ¶ 6 (noting that the fifth proposition of law was dismissed for lack of jurisdiction). Accordingly, such a decision regarding NEP qualifying as a public utility was not before the Court; therefore, we find unavailing AEP Ohio's argument about the remand being unnecessary.

{¶ 196} AEP Ohio also suggests that the definition of "consumer" is clarified by the definition of "electric load center" in the CTA, which reinforces the notion that tenants are consumers (AEP Ohio Reply Br. at 26). However, as already detailed above, we believe the precedent under current law is unmistakable on this issue and find it unnecessary to apply the CTA here. *Pledger*, when asserting that the landlord is the consumer, specifically relies on *FirstEnergy* which pertained to resale of electric service from landlord to tenant. *Pledger* at ¶¶ 37-38. Significantly, the Commission in *Brooks* and the Court in *FirstEnergy*, both of which were decided well after the enactment of the CTA in 1978, did not apply the CTA to

reach their conclusions on this issue. Therefore, we find AEP Ohio's argument unconvincing.

ii. "ENGAGED IN THE BUSINESS OF SUPPLYING ELECTRICITY"

{¶ 197} Next, we analyze whether NEP is "in the business of supplying electricity" under R.C. 4905.03(C). Through its comprehensive examination of this case's vast record, AEP Ohio attempts to compare NEP's business and activities at the Apartment Complexes to that of a public utility, like AEP Ohio. NEP does not dispute much of the evidence AEP Ohio submits in furtherance of their claim that NEP is "in the business of supplying electricity," especially regarding the specifics of the contracts between the property owners and NEP and NEP's internal documents. Rather, NEP asserts that such evidence demonstrates that it is not a public utility. We agree with NEP that the pertinent facts in the record demonstrate that AEP Ohio has not met its burden of proving that NEP is engaged "in the business of supplying electricity" and, thus is an "electric light company" and a "public utility."

{¶ 198} Pursuant to the CCSAs and MIA, NEP must install "Meter Equipment," such as electric meters, ERTs, and equipment to receive transmission of the ERTs, as well as non-meter equipment at the properties, such as weatherheads, conduit, wires, and CT cabinets at the Apartment Complexes (Ex. G at G-7 (CCSA 1.1.3), G-39[3]; Tr. VII at 1220-1228). The Apartment Complexes all consist of secondary configurations instead of primary configurations (AEP Ohio Ex. 3 at 22). NEP installs the equipment, sometimes described as distribution equipment, at its sole cost and expense and in compliance with the National Electric Code or NESC (Ex. G at G-7 (CCSA 1.1.3), G-12 (CCSA 1.7), G-33 (MIA, Service Terms § 5), G-39 (MIA, Ex. A); Tr. VI at 1047-48). Further, NEP must maintain and repair the above equipment at its sole cost and expense and must repair the equipment within the

[3] At times we will be citing to a single contract for ease of reference, using Arlington Pointe as an example, but all of the contracts are substantially similar.

standard practices of the local utility, meaning AEP Ohio (Ex. G at G-7 (CCSA 1.2.1), G-8 (CCSA 1.2.3), G-12 (CCSA 1.7); Tr. VI 1043-44, 1048).

{¶ 199} The evidence in the record shows that ownership of equipment necessary to resell the electricity now passes to the landlord. According to the Amendment and Supplement to the MIA and CCSA executed in January and March of 2022, the landlords became the owners of the Meter Equipment, and NEP was no longer entitled to remove the Meter Equipment at the expiration or termination of the agreement (Ex. G at G-42 (Amendment and Supplement to the MIA and CCSA 1.A), G-84, 128, 172, 217; Jt. Ex. 1). Prior to these amendments, NEP was the "owner and title holder of the Meter Equipment," and NEP had a right to remove the equipment from the property when the CCSA expired or was terminated (Ex. G at G-15 (CCSA 5.1)). An email exchange produced by NEP during discovery appears to show that the ownership change likely resulted from this Complaint being filed (AEP Ohio Ex. 4 at 1-3 - CONFIDENTIAL; Tr. VI at 1053-1056 - CONFIDENTIAL). Despite the ownership change, if the contract is terminated early, a termination fee is assessed that is designed, in part, for NEP to recover the remainder of its investment in the equipment at the Apartment Complexes (Ex. G at G-30 (CCSA Ex. H); Tr. VI at 1119). While AEP Ohio believes the contracts do not expressly address ownership of the non-meter equipment, considering NEP's witness testimony and NEP's other arguments regarding non-meter equipment, the weight of the evidence supports a finding that NEP does not own such equipment (NEP Ex. 90 at 24-25; NEP Ex. 91 at 8; Tr. VI at 1045; NEP Reply Br. at 27-28).

{¶ 200} Significantly, underpinning the entire contract at each of the Apartment Complexes is a general grant of authority from the landlord to NEP to operate on the landlord's behalf related to the "provision of services." (Ex. G at G-7 (CCSA 1.1.1), G-51, 93, 182). Specifically, Section 1.1.1 states:

> Provider [i.e., NEP] will, on Customer's [i.e., landlord] behalf with respect to the Community, provide certain services (the 'Services') with

> respect to each Commodity indicated on the Cover Sheet, generally described as follows: (i) advising Customer regarding the supply and delivery of Commodity to the Community; (ii) providing certain metering services relative to Commodity usage; (iii) invoicing Unit lessees ('Lessees') for Commodity usage; collecting Lessees amounts due for Commodity usage; (iv) collecting from Lessees amounts due for commodity usage; (v) paying, on behalf of Customer, the Electric Commodity Costs to the applicable provider(s) as described further in Section 1.3.5; and (vi) timely address and respond to all questions and concerns related to this Agreement or the provision of the Services that Customer or Residents of Customer may submit from time to time.

(Ex. G at G-7 (CCSA 1.1.1), G-51, 93, 182).

{¶ 201} Furthermore, the contract consists of numerous other grants of authorization from the landlord to NEP enabling NEP to act on the landlord's behalf. As NEP effectively lays out in its initial and reply briefs, NEP has the right to enter into agreements with AEP Ohio "* * * on behalf of Customer [landlord] as its authorized agent * * *" under Section 1.1.4 (Ex. G at G-7 (CCSA 1.1.4)). Also, "* * * on behalf of the Customer as the Customer's authorized agent * * *" NEP has full discretion to contract with an alternative commodity source (Ex. G at G-8 (CCSA 1.3.2)). NEP "* * * shall be authorized to enter into the necessary contractual arrangement to purchase Commodity in the name of Customer and as Customer's authorized agent from an Alternative Commodity Source or Utility" (Ex. G at G-8 (CCSA 1.3.2)). Landlord "* * * agrees that Provider [NEP] shall be Customer's agent and authorized representative and Provider shall act on behalf of Customer with respect to the Community's electric utility account(s)" (Ex. G at G-8-9 (CCSA 1.3.3)). The landlord also remains obligated to pay its utility bills; however, NEP "* * * shall timely pay, on behalf of Customer, all Electric Commodity Costs * * *" (Ex. G at G-9 (CCSA 1.3.5)). NEP "* * * shall, on Customer's behalf" calculate bills and send bills to residents (Ex. G at G-9 (CCSA 1.4.2)). Tenants make payments to NEP which it receives "* * * on behalf of the Customer * * *[,]"

and, in the event a tenant fails to pay an electric bill, the contract authorizes NEP to disconnect electric service (Ex. G at G-11 (CCSA 1.4.6)). Further, NEP can "* * * at Customer's direction * * *" disconnect electric service for a tenant's failure to pay an electric bill (Ex. G at G-11 (CCSA 1.5)). The landlord also appointed NEP "* * * as its authorized agent * * *" for the purposes of negotiating and effecting agreements with the applicable utility, including executing all documents associated with conversions (Ex. G at G-16 (CCSA 5.5)). The landlord separately "* * * authorizes [NEP] to act on behalf of the account holder of the host utility electric accounts * * *" including executing all forms and contractual arrangements needed to switch electric supply to an alternative commodity source service provider (Ex. G (CCSA, Ex. E)). 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 (Ex. G at G-31(CCSA, Schedule 1), G-74, 117, 161, 206).

{¶ 202} 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 (NEP Ex. 90 at 16, Ex. E; Tr. VI at 1025). 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" (NEP Ex. 90, Ex. E). Mr. Williams confirmed that the above form can be used to manage the customer's account in the ways described in the form (Tr. II at 258-60, 389-90 - CONFIDENTIAL).

{¶ 203} Pursuant to Section 1.1.4 of the CCSA, NEP is responsible for all aspects of the conversion process with AEP Ohio, including the cost of the conversions (Ex. G at G-7 (CCSA 1.1.4), G-33 (MIA Cover Sheet); AEP Ohio Ex. 3 at 19-20, 23). NEP also has full discretion to choose default service, a CRES provider, or an aggregator for electric supply at the complexes, and each landlord waived its right to make decisions regarding purchasing such supply of electricity (Ex. G at G-8-9 (CCSA 1.3.1-1.3.3); Tr. VI at 1044-45). In effect, the CCSA requires NEP to the pay bills related to electric service to the master meter, and NEP agrees to hold harmless the landlord of any loss or damage if NEP fails to timely pay the

utility bills (Ex. G at G-9 (CCSA 1.3.5)). The CCSA further states that the landlord will "take title" to the electricity delivered to the master meter (Ex. G at G-9 (CCSA 1.3.4)).

{¶ 204} The contract requires NEP to read the tenants' meters on a regular basis as well as other-metered facilities such as common areas or a clubhouse at the properties (Ex. G at G-9 (CCSA at 1.4.1)). Tenants' monthly electric bills issued by NEP have two components, one charge for tenants' usage at their individual units and the other charge for a portion of common area usage (Ex. G at G-9-10 (CCSA 1.4.3, 1.4.5)). According to the contract, the individual consumption rate is supposed to be the same or lower than what AEP Ohio would charge tenants for the same level of usage if the tenants were customers of AEP Ohio, and the same goes for the common area rate except this rate is tied to AEP Ohio's commercial rate (Ex. G at G-9-10 (CCSA 1.4.3, 1.4.5)). NEP has discretion over its bill format, which was modeled from public utility bills in existence in 2015, though an example bill format was attached to the contracts signed by the landlords and NEP (Ex. G at G-9 (CCSA 1.4.2); NEP Ex. 90 at 19-20). NEP's electric bills instruct tenants to remit payments to NEP, not the landlord (Ex. G at G-14-15 (CCSA 4.4.1)). The amount a tenant owes for that tenant's electric bill is considered a component of the tenant's rent (Tr. VI at 1100-1101; Ex. G at G-14-15 (CCSA 4.4.1)).

{¶ 205} Regarding the fee for NEP's services, the contract details an arrangement whereby NEP incurs essentially all costs to provide electric service to tenants at the properties and is paid for its services by keeping the revenues collected from tenants' bills (Ex. G at G-12-13 (CCSA 3.1)). NEP makes a profit from this arrangement because it pays for master-meter service at AEP Ohio's commercial rate (general service rate) in its tariff, which is lower than the residential rate in the tariff. NEP bases its residential rate in part on AEP Ohio's residential rate. Thus, the rate arbitrage between the commercial rate paid by NEP and residential rate charged by NEP is sufficient for it to make a profit. (NEP Ex. 90 at 5, 16, 51, Ex. G at G-9-10 (CCSA 1.4.3)). Furthermore, NEP pays the landlord a "forward commission," which is an upfront payment to the landlord, paid to the landlord at different points after the contract is signed (Ex. G at G-33 (MIA Cover Sheet)). NEP also pays the

landlords residual payments, essentially a monthly payment of $6.00 per unit that is currently occupied by a tenant (Ex. G at G-16-17 (CCSA 6.1-6.2)).

{¶ 206} The contract allows for NEP to collect security deposits from tenants, but NEP has not collected security deposits since at least October 2020 when Ms. Ringenbach first became employed by NEP (Tr. VI at 1085-86; Ex. G at G-11 (CCSA 1.4.7)). An internal document from NEP shows that a policy exists related to collecting interest on the deposits (AEP Ohio Ex. 6 at 36 (NEP003663)- CONFIDENTIAL). The contract also allows for NEP to offer tenants payment plans, and NEP has full discretion over what kind of plans to provide (Ex. G at G-11 (CCSA 1.4.6)). The parties presented evidence showing the types of plans offered, and no plans are based upon income level of a tenant (AEP Ohio Ex. 1C at 72, Ex. SDL-4C-CONFIDENTIAL; Tr. VI at 1109-1110). If a tenant fails to pay an electric bill, the CCSA provides that, "* * * Subject to compliance with applicable law, at Customer's [i.e., landlord] direction Provider [i.e., NEP] may terminate Commodity service to any such Unit as long as proper written notice to the defaulting Lessee is provided prior to terminating such services" (Ex. G at G-11 (CCSA 1.5)). In regard to NEP disconnecting electric service to a tenant, Ms. Ringenbach testified that, "NEP provides to the property owner a list of units that are eligible for disconnection, and then the property owner indicates to us whether or not they should be disconnected." (Tr. VI at 1095). She further stated that "[s]ometimes they [the landlord] specifically say on the report yes, and then sometimes it's if they don't do anything, then it's assumed that disconnection moves forward" (Tr. VI at 1096). NEP disconnected tenants' electric service frequently in 2021 (AEP Ohio Ex. 1C at 78, SDL-5C-6C - CONFIDENTIAL).

{¶ 207} AEP Ohio does not necessarily argue that the landlord would be violating the law and AEP Ohio's tariff if NEP was removed from the picture and the landlord was engaged in the activities described above(outside of the disconnect and security deposit

arguments noted below).[4] Again, AEP Ohio presumes that the Court in *Wingo* recognized big business, third-party submetering as a distinct factual scenario not contemplated by precedent which left a gap in law related to the Commission's jurisdiction over such companies. As explained above, we believe the Court merely abrogated the modified *Shroyer* test and remanded the case back to the Commission to apply the facts of the case to the statutory language. We make the following findings, which establish that NEP is not "engaged in the business of supplying electricity": (1) the landlords and not NEP supply electricity to tenants under the terms of the leases on their own property, as already permitted by law; (2) foundational to all aspects of NEP's activities at the Apartment Complexes, the landlords have entered into express agency relationships with NEP through contracts that authorize NEP to "step into the shoes of the landlords" in facilitating submetering service at the properties; (3) as the landlords' agent, 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.

{¶ 208} 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. First, we note that this finding dovetails with our discussion concerning what constitutes a "consumer" under R.C. 4905.03(C) where we examined past Court and Commission precedent related to submetering by landlords to tenants. Above, we concluded that the landlord at the Apartment Complexes is the "consumer" under the statute. As such, each landlord (the consumer) resells the electric service it receives at the metered point of delivery (the submeter) to its tenants through a contractual arrangement (the lease). As noted above,

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4 Throughout AEP Ohio's briefs it asserts that landlords can legally engage in resale without using third-party submetering companies. AEP Ohio recently entered into a settlement agreement with Oak Creek Apartments, LLC and Worthington Square Acquisition, LLC whereby AEP Ohio agreed to let the apartment owners submeter their complex but only if they did not hire a third-party submetering company (AEP Ohio Ex. 3, Ex. JFW-2). AEP Ohio specifically argues that this arrangement is appropriate since landlords are legally allowed to engage in resale (AEP Ohio Ex. 1 at 95-96). Curiously, AEP Ohio reserves the right, on appeal, to argue against precedent related to the general principle that landlords may provide resale service to tenants (AEP Ohio Initial Br. at 88, footnote 15; AEP Ohio Reply Br. at 15, footnote 2).

among other provisions related to resale, the CCSA contains a provision that is required to be in the lease between each landlord and tenant, which states, "Lessor shall secure and resell to Lessee, and Lessee shall promptly pay all charges incurred for * * * electricity * * *" (NEP Ex. 90 at 10; Ex. G at G-14, 58, 100, 145, and 189 (CCSA 4.4.1)). In *FirstEnergy*, the Court confirmed, as articulated by the Commission in *Brooks*, that redistribution or resale of electricity by a landlord to its tenants is a matter of landlord-tenant relations and does not fall within the Commission's jurisdiction. *FirstEnergy* at ¶ 9; *S.B. 3 Case* at ¶ 3. Furthermore, the Court stated that "* * * the commission's decision simply affirmed the right of landlords and tenants to enter into lease agreements that appoint the landlord to secure, resell, and redistribute electric service to its tenants. Under such leases, agreed to by tenants, the tenants exercise choice by appointing their landlord to make decisions and arrangements concerning electric utility service." *FirstEnergy* at ¶ 10. As such, the landlords supply tenants with electricity at the Apartment Complexes through leases. As it relates to NEP, the CCSA specifically states that the landlord, and not NEP, takes title to the electricity, which then is delivered to the tenants (Ex. G at G-9 (CCSA 1.3.4)). And, again, we emphasize that, without NEP in the picture, AEP Ohio does not dispute that landlords can resell electricity service to tenants and not be considered a public utility under R.C. 4905.02(A) and 4905.03(C) (AEP Ohio Initial Br. at 88-89). Considering the resale of electricity by the landlords at the Apartment Complexes is controlled by the lease, we find it appropriate to further highlight, as the Court did in *FirstEnergy*, that issues related to landlord-tenant law extend beyond the Commission's jurisdiction. *Brooks*, Opinion and Order (May 8, 1996) at 15; *FirstEnergy* at ¶¶ 9-10.

{¶ 209} At this point in the discussion, since we have established that the landlord at each of the Apartment Complexes is the "consumer" of retail electric service from AEP Ohio and "supplies electricity" to tenants under the leases pursuant to R.C. 4905.03(C), we note that the next portion of the discussion must relate to the landlords' relationship with NEP and NEP's role at the Apartment Complexes. Examining this relationship reinforces our conclusion that AEP has not met its burden of proving that NEP is "engaged in the

business of supplying electricity" at the Apartment Complexes. First and foremost, despite AEP Ohio's argument that the Commission should view the contracts between the landlords and NEP through the lens of *substance over form*, the record shows that NEP appears to be functioning as each landlord's authorized agent to facilitate the conversion of the Apartment Complexes to submetering and to handle nearly all aspects of electric service resale to tenants on behalf of the landlords at the Apartment Complexes. NEP's agency relationship factors into all aspects of NEP's activities at the Apartment Complexes. The relationship between the landlords and NEP is controlled by contract, namely the CCSA, MIA, and related amendments and supplements (NEP Ex. 90 at 20-22). As extensively detailed above, a broad grant of agency authority exists at the beginning of the CCSA and in Schedule 1 of the CCSA (Ex. G at G-7 (CCSA 1.1.1), G-51, 93, 182; Ex. G at G-31 (CCSA Schedule 1), G-74, 117, 161, 206). Additionally, the contract contains numerous other authorizations from the landlord to NEP enabling NEP to act on behalf of the landlord, as detailed in the above paragraphs. Furthermore, the landlords have executed AEP Ohio's own LOAs, authorizing NEP to interact with AEP Ohio related to the landlords' accounts at the Apartment Complexes (NEP Ex. 90, Ex. E; Tr. II at 258-60, 389-90).

{¶ 210} AEP Ohio offers several reasons to support its argument that NEP is "engaged in the business of supplying electricity" under R.C. 4905.03(C) and is an "independent, third-party supplier of electric service." AEP Ohio argues that NEP being responsible for installing, maintaining, and repairing the distribution equipment at its own expense as described above supports the conclusion that NEP is engaged in the business of supplying electricity and is an independent, third-party supplier of electric service (AEP Ohio Initial Br. at 91-95). AEP Ohio also argues that further support for this conclusion exists in that NEP procures electric service at the master meter for resale by handling the conversion process at the Apartment Complexes, arranging for electric supply through default service or CRES, paying all utility bills, and recovering costs through charging tenants for their electric usage (AEP Ohio Initial Br. at 95-97). AEP Ohio believes that NEP conducting meter reading and handling the billing process for tenants supports the above

conclusion, as does the format of the electric bill NEP uses (AEP Ohio Initial Br. at 98-102; AEP Ohio Reply Br. at 29). Furthermore, AEP Ohio asserts that NEP offering payment plans to tenants, engaging in the utility-specific activity of disconnecting electric service for nonpayment, and maintaining a customer service center is evidence of the above conclusion (AEP Ohio Initial Br. at 88-89; AEP Ohio Initial Br. at 28). Finally, AEP Ohio argues that NEP profiting from the electric service it provides and paying the landlords a forward commission and residual payments support this conclusion as well (AEP Ohio Initial Br. at 108-9). Only after taking all of these components of NEP's activities together, AEP Ohio argues that NEP is "engaged in the business of supplying electricity" (AEP Ohio Ex. 1 at 92-93; Tr. I at 120-122).

{¶ 211} We do not find AEP Ohio's arguments in this regard to be persuasive. First, we note that AEP Ohio does not argue that the landlord would be violating the law and AEP Ohio's tariff if it engaged in any of the above activities. Regarding installing, maintaining, and repairing the distribution equipment at the Apartment Complexes, we agree with NEP that contracting with service providers to perform these tasks does not in and of itself mean NEP is supplying electricity to tenants. Other non-third-party electrical companies who are contracted to perform similar work on infrastructure, whether as a contractor for AEP Ohio or for a landlord converting to master-meter service but not using a third-party submetering company, would not be considered a public utility when performing these services. Although those contractors likely would be paid directly by AEP Ohio or the landlord instead of by collecting revenues resulting from tenants' electric usage like NEP does, in the context of this case, we find that the payment arrangement, including the forward commission and residual payments described in the lease, was willingly agreed to by the landlords and NEP and, as such, our conclusion regarding their relationship remains the same. Finding otherwise encroaches on issues related to private parties' freedom to contract, considering the landlords willingly entered into these contracts to have NEP operate at the Apartment Complexes in the manner set forth in each contract.

{¶ 212} 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 LOAs (Ex. G at G-7 (CCSA 1.1.1); NEP Ex. 90 at 16, Ex. E; Tr. VI at 1025). The landlord also specifically allows NEP to purchase supply from an alternative commodity source, such as from a CRES supplier or aggregator (Ex. G at G-8 (CCSA 1.3.2)). In response to AEP Ohio's argument that meter reading and billing tenants is evidence of supplying electricity, the record is clear that NEP is reading the meter as the agent of the landlord. Further, regarding billing, the landlord authorizes NEP to bill tenants for their electric usage (Ex. G at G-9 (CCSA 1.4.2)). AEP Ohio also compares NEP's bill format to AEP Ohio's bills as well as NEP's bills to the Commission rules regulating what a public utility can place on its bill. NEP admitted that it modeled its bill format off of other public utility bills in existence in 2015 (NEP Ex. 90 at 19-20). While the contract provides NEP with discretion over bill format, the landlords had notice of the bill format before entering into an agreement with NEP since an example bill was attached to the contracts (Ex. G at G-9 (CCSA 1.4.2, Ex. D); NEP Ex. 90 at 19-20). Also, while the bill does direct the tenant to pay NEP and to contact NEP and not the landlord with issues, the example bill still states that it is "on behalf of your community, [community name]" in the NEP logo at the top left of the bill and states the same within the "Fees" section (Ex. G (CCSA, Ex. D)). And, again, the landlords authorized NEP to bill tenants, collect tenants' electric usage charges, and provide customer service to the tenants on behalf of the landlord (Ex. G at G-7 (CCSA 1.1.1), G-9 (CCSA 1.4.2)). On the other hand, there is no evidence of a direct contractual relationship between NEP and the tenants. As such, AEP Ohio's bill argument is unavailing.

{¶ 213} AEP Ohio also argues that, as further evidence that NEP is "engaged in the business of supplying electricity," NEP provides payment plans to the tenants that do not align with Commission rules related to payment plans public utilities are required to provide and that NEP disconnects tenants' electric service for nonpayment. Here, each landlord authorizes NEP to act on its behalf to provide payment plan options to tenants (Ex.

G at G-11 (CCSA 1.4.6)). While the topic of disconnecting electric service to a residential tenant is of utmost importance to the Commission, especially considering NEP appears to have frequently disconnected tenant electric service in 2021, we note that disconnecting electric service at the Apartment Complexes is subject to the landlord's direction, specifically, "* * * Subject to compliance with applicable law, at Customer's [i.e., landlord's] direction Provider [i.e., NEP] may terminate Commodity service to any such Unit as long as proper written notice to the defaulting Lessee is provided prior to terminating such services" (AEP Ohio Ex. 1C at 78, SDL-5C-6C - CONFIDENTIAL; Ex. G at G-11 (CCSA 1.5)) (Emphasis added). In regard to NEP disconnecting electric service to a tenant, Ms. Ringenbach testified that, "NEP provides to the property owner a list of units that are eligible for disconnection, and then the property owner indicates to us whether or not they should be disconnected." (Tr. VI at 1095). She further stated that "[s]ometimes they [the landlord] specifically say on the report yes, and then sometimes it's if they don't do anything, then it's assumed that disconnection moves forward" (Tr. VI at 1096). Considering the above, we 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. Furthermore, any potential issue with the landlord disconnecting a tenant's electric service through its agent is a matter of landlord-tenant law and not within our jurisdiction. *Brooks*, Opinion and Order (May 8, 1996) at 15; *FirstEnergy* at ¶¶ 9-10.

{¶ 214} To further support the above conclusion that NEP is not "engaged in the business of supplying electricity," we note that whether third-party service providers act as public utilities when operating on behalf of landlords is not entirely novel. In *Brooks*, we discussed a previous case before us, stating that "[t]he mall/tenant electric service arrangements in the instant case closely parallels shared tenant services where a third-party provides telecommunications services to the occupants of multi-tenant buildings, complexes, or developed properties through a private branch exchange." *Brooks*, Opinion and Order (May 8, 1996) at 16. We further discussed the conclusion of that case, *In re*

Commission Investigation of Resale and Sharing of Local Exchange Telephone Service, Case No. 85-1199-TP-COI (*Telephone Case*), Opinion and Order (Aug. 19, 1986), in *Brooks*, stating that "* * * we determined that such arrangements are not subject to this Commission's regulatory jurisdiction because these service providers are not public utilities, but private operations which do not offer services to the general public." *Brooks* at 16. Additionally, the above *Telephone Case*, where we found that third-party service providers serving tenants do not serve the general public, further undermines AEP Ohio's argument that NEP serves the general public because it operates at apartment complexes that represent purportedly 1.75 percent of AEP Ohio's residential customer base and continues to grow its business (AEP Ohio Ex. 3 at 7). Considering all of the above concerning NEP's operations and relationship with the landlords, we find merit in Ms. Ringenbach's description of NEP as essentially a service provider, providing such services as energy control, advisory services, energy construction and design solutions, electric vehicle charging, equipment financing, utility rates and tariff monitoring and support, tenant billing, and other energy-related services for the landlords (NEP Ex. 90 at 4-10). Specifically, we find that, as the landlord's agent, 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.

{¶ 215} Further, with regard to AEP Ohio's electric resale tariff, both the version in existence at the time the Complaint was filed, and the version put into effect on December 1, 2020, we find that NEP did not violate the tariff provisions (AEP Ohio Ex. 2 at 3-4, Ex. JLM-1; NEP Ex. 90 at 30-32, Ex. L, Ex. M). For the same reasons discussed above, NEP is not an electric light company under R.C. 4905.03(C) at the Apartment Complexes. Furthermore, for the same reasons as stated above and in line with the tariff, the landlords are not operating as a public utility, and, as required by the tariff, they own the properties upon which they are engaged in resale to tenants.

{¶ 216} For the reasons stated above, we find that, under the plain language of R.C. 4905.03(C), NEP is not an electric light company and, therefore, not a public utility under R.C. 4905.02(A).

iii. SHROYER TEST

{¶ 217} Although we have reached the conclusion that NEP does not act as an electric light company and public utility when applying the plain language of R.C. 4905.03(C) and 4905.02(A), the Supreme Court of Ohio did not explicitly overrule its adoption of the *Shroyer* test in *Wingo* even though the Court did overrule use of the modified *Shroyer* test.[5] Nevertheless, applying the *Shroyer* test, we find that the *Shroyer* test confirms and further bolsters our finding that NEP does not act as a public utility.

{¶ 218} The first prong of the *Shroyer* test asks whether the landlord or reseller manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or the use of the public right of way for utility purposes. We find that AEP Ohio has not proven that NEP's operations at the Apartment Complexes meet the first prong of the test. NEP entered into contracts with the landlords to act as the landlords' agent to help facilitate submetering service on the landlords' private property (NEP Ex. 90 at 20-22, Ex. G; AEP Ohio Ex. 1 at 2, SDL-1). We find that there is no evidence in the record demonstrating that NEP accepted a grant of franchised territory, possesses a certificate of public convenience and necessity, used eminent domain, or used a public right of way for utility purposes.

{¶ 219} Regarding AEP Ohio's assertion that NEP manifests an intent to be a public utility by using a bill format similar to that used by a public utility, we find no merit to this

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[5] Both parties argue that the *Shroyer* test need not be applied since a conclusion regarding whether NEP is a public utility can be decided under an analysis of the applicable statutory language (AEP Ohio Reply Br. at 30-31; NEP Initial Br. at 61-62).

argument. First, using a bill format similar to a public utility does not appear in the first prong as an example of a special benefit available to a public utility. Also, in no way is using a bill format similar to that of a public utility comparable to the types of benefits (e.g., the use of eminent domain) contemplated by the first prong of the *Shroyer* test. And, again, the landlords authorized NEP to bill tenants, collect tenants' electric usage charges, and provide customer service to the tenants on behalf of the landlord (NEP Ex. 90, Ex. G at G-7 (CCSA 1.1.1), G-9 (CCSA 1.4.2)). In regards to AEP Ohio's argument that NEP engages in the utility-specific activity of disconnecting tenants' electric service for nonpayment and that doing so violates R.C. 5321.15(A), we are not persuaded that disconnection is a special benefit available only to a public utility. Moreover, with respect to the argument that such disconnection violates R.C. 5321.15(A), ruling on such a claim is not within our jurisdiction, as it pertains to landlord-tenant law. As already discussed above, landlord-tenant disputes are not within the administrative expertise of the Commission. *Brooks*, Opinion and Order (May 8, 1996) at 15. Also, as each landlord's agent, 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 (Ex. G at G-11 (CCSA 1.5); Tr. VI at 1095-96). Finally, even assuming that disconnecting tenants' electric service for nonpayment violates R.C. 5321.15(A), affected tenants have remedies under landlord/tenant law.

{¶ 220} The second prong of the *Shroyer* test asks whether the utility service is available to the general public rather than just to tenants. We find that AEP Ohio has not proven that NEP's operations at the Apartment Complexes satisfy the second prong of the test. First, as already found above, it is the landlord, and not NEP, "supplying electricity" to the tenants of the Apartment Complexes, and NEP operates as each landlord's agent in facilitating submetering service, reselling electric service to tenants (NEP Ex. 90 at 10, Ex. G at G-14 (CCSA 4.4.1), G-58, 100, 145, and 189). Further, each landlord, via NEP's services as each landlord's agent, resells electricity to lessees on their private properties and there is no evidence that such sales are made to the general public. Furthermore, we find no merit in

AEP Ohio's argument that NEP serves the general public because it now serves approximately 1.75 percent of its residential customer base at apartment complexes throughout AEP Ohio's service territory and intends to grow its business exponentially (AEP Ohio Ex. 3 at 7). As noted in *Brooks*, we have previously found that third-party service providers of telecommunication services at multi-tenant buildings are private operations that serve tenants and not the general public. *Brooks*, Opinion and Order (May 8, 1996) at 16, citing to *In re Commission Investigation of Resale and Sharing of Local Exchange Telephone Service*, Case No. 85-1199-TP-COI, Opinion and Order (Aug. 19, 1986).

{¶ 221} The third prong of the *Shroyer* test asks whether the provision of utility service is ancillary to the landlord's primary business. We find AEP Ohio has not proven that NEP meets the third part of the test. As already found above, it is the landlord, and not NEP, "supplying electricity" to the tenants of the Apartment Complexes, and NEP operates as each landlord's agent in facilitating submetering service, reselling electric service to tenants (NEP Ex. 90 at 10, Ex. G at G-14 (CCSA 4.4.1), G-58, 100, 145, and 189). NEP is simply the agent of the landlord when facilitating submetering service at the Apartment Complexes. NEP, itself, is essentially a service provider a landlord hires to provide services such as energy control, advisory services, energy construction and design solutions, electric vehicle charging, equipment financing, utility rates and tariff monitoring and support, tenant billing, and other energy-related services (NEP Ex. 90 at 4-10).

{¶ 222} Considering the above, we find that AEP Ohio has not demonstrated that NEP has met any prong of the *Shroyer* test; therefore, we again find that NEP is not "engaged in the business of supplying electricity" under R.C. 4905.03(C) and, thus, not a public utility under R.C. 4905.02(A).

iv. CONSUMER HARM

{¶ 223} AEP Ohio also argues that the Commission should consider consumer harm when analyzing R.C. 4905.02(A) and 4905.03(C), noting that considerable consumer harm to

tenants results from NEP's submetering business. According to AEP Ohio, consumers are harmed primarily in the following ways: there is no Commission oversight of rates and terms under R.C. 4905.22 and 4905.26 as well as tenants being forced to adjudicate disputes through the court system rather than through the Commission's complaint procedures; the opportunity for consumers to shop for electric supply is cut-off; consumer costs are increased through common area charges at the properties; PIPP is not offered and the payment plans that are offered fall below the Commission's minimum standards; protections related to disconnection of service are eliminated or weakened; customer confusion increases; and conversions cause a drain on AEP Ohio resources that could be used to invest in the distribution grid. (AEP Ohio Ex. 1 at 22, 42, 59-61, 74-75, 82-85, 89-90; AEP Ohio Ex. 2 at 6; Tr. VI at 1109-10; AEP Ohio Ex. 3 at 12-14; AEP Ohio Initial Br. at 125-32.) AEP Ohio argues that, if the Commission deems R.C. 4905.02(A) and 4905.03(C) ambiguous, then the Commission should examine, under R.C. 1.49, the intent of the legislature in enacting the above statutes. Within that analysis, AEP Ohio argues that the Commission should consider consumer harm. We, however, do not find R.C. 4905.02(A) or 4905.03(C) ambiguous. The Court has not declared those terms ambiguous and, in fact, ordered the Commission to apply the plain language of the statute to reach a conclusion regarding jurisdiction of NEP. *Wingo* at ¶ 26. Under current law, as previously stated, the Commission finds that NEP is not a public utility. Moreover, for the reasons stated above regarding a landlord being the "consumer" under R.C. 4905.03(C) and reselling electricity through leases to tenants, tenants would lose the rights AEP Ohio describes above once a landlord elects under AEP Ohio's tariff to receive master-meter service to engage in redistribution and resale of electric service, even if the landlord does not hire a third-party submetering company. That said, the Commission shares many of the concerns articulated by AEP Ohio regarding consumer protections.

{¶ 224} Specifically, we find the testimony of Mr. Lesser convincing in that tenants lose a multitude of rights and protections listed in the previous paragraph that ensure consumers receive adequate, safe, and reasonable electric service, as required by law. The

Commission takes seriously the circumstance where a tenant loses Commission protections resulting from a landlord electing master-meter service, and we recognize the potential repercussions of the finding that NEP is not acting as a public utility. We reached our conclusion by doing so in a manner consistent with the limitations imposed upon the Commission by statute, and that is to apply the jurisdictional statute, as directed by the Court in *Wingo* (*Wingo* at ¶ 26). As noted by the Court, "[i]t may well make sense for the General Assembly to directly address the question whether entities that engaged in submetering fall within the PUCO's jurisdiction." *Wingo* at ¶ 25. As the Commission finds that NEP is not a public utility and therefore not subject to our jurisdiction, we lack the power to directly regulate NEP's actions. However, we emphasize that we have "* * * authority to set reasonable terms and conditions on jurisdictional utilities providing master meter service so as to ensure that users of that service, such as landlords, are providing it to the ultimate end user in a manner which is safe and consistent with the public interest." *Brooks*, Opinion and Order (May 8, 1996) at 16, footnote 12. The record of this case demonstrates a clear need for reasonable terms and conditions on the resale of public utility service. Accordingly, we direct AEP Ohio to file within 90 days a new electric reseller tariff that places the following conditions on the resale of electric service from a landlord to a tenant that a landlord must follow in order to comply with the tariff:

1. Notice must be provided within the landlord's lease agreement stating that, by signing the lease, the tenant agrees to have the landlord secure and resell electricity to the tenant and that, under current law, the tenant is no longer under the jurisdiction of the Commission and loses the rights under law associated with being under the Commission's jurisdiction. This language should be printed in the lease in all capital letters and in a minimum font larger than the remainder of the lease language.

2. The landlord's charges for resale of electricity to each tenant must be the same or lower than the total bill for a similarly situated customer served by the applicable utility's standard service offer.

3. When engaging in the disconnection of electric service to a tenant for nonpayment of charges related to electric usage, the landlord must follow the same disconnect standards applicable to landlords under Ohio Adm.Code Chapter 4901:1-18.

{¶ 225} Further, although our decision in *Brooks* involved invalidating a utility tariff where the utility unilaterally prohibited a landlord from engaging in certain resale activities, we believe the above directive is distinguishable because it consists of terms and conditions for engaging in resale as compared to prohibitions in the *Brooks* case, and the directive comes at the Commission's behest under its limited jurisdiction in the area of resale instead of unilaterally from a utility. *Brooks*, Opinion and Order (May 8, 1996) at 3. As stated above and despite the conclusion regarding the tariff in the *Brooks* case, both in *Brooks* and in *Shroyer*, we noted that "* * * the Commission has the requisite authority in its regulation of public utilities to set terms and conditions on the resale of a utility's service to ensure that such service is provided in a manner which is safe and consistent with the public interest." *Brooks* at 16, footnote 12, citing *Shroyer*, Opinion and Order (Feb. 27, 1992) at 5. In *Brooks*, we even specifically noted that an example of this "requisite authority" could be found in the disconnection procedures related to landlords in Ohio Adm.Code Chapter 4901:1-18. *Brooks* at 16, footnote 12. Accordingly, the Commission has the requisite authority to direct the public utility to set reasonable terms and conditions on the resale of public utility service. Furthermore, there is ample precedent where we have exercised our authority over public utilities' tariffs to ensure adequate consumer protections are included in such tariffs. For instance, the Commission directed natural gas companies to establish natural gas retail choice programs through their tariffs and to include reasonable consumer protections for these choice programs. *In re the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, Case No. 98-593-GA-COI, Finding and Order (June 18, 1998); *In re the Application of Columbia Gas of Ohio, Inc.*, Case No. 96-1113-GA-ATA, Opinion and Order (Jan. 9, 1997); *In re the Application of The East Ohio Gas Co.*, Case No. 96-1019-GA-ATA, Opinion and Order (July 2, 1997); *In re the Application of The Cincinnati Gas & Elec. Co.*, Case

No. 95-656-EL-AIR, Opinion and Order (Dec. 12, 1996), Supplemental Opinion and Order (July 2, 1997). Accordingly, we find that the directive above regarding AEP Ohio's resale tariff is consistent with the public interest of protecting tenants who lose rights related to electric service once a landlord elects to receive master-meter service at its complex.

{¶ 226} In conclusion, as detailed above, AEP Ohio has failed to carry its burden of proving that NEP is an electric light company under R.C. 4905.03(C) and, therefore, a public utility under R.C. 4905.02(A).

b. Count II—Whether NEP's Operations at the Apartment Complexes Violates AEP Ohio's Certified Territory under R.C. 4933.83(A)?

{¶ 227} In concluding that NEP is not a public utility or electric light company under R.C 4905.02(A) and 4905.03(C), we can easily dispense with AEP Ohio's second count in the Complaint that NEP's operations at the Apartment Complexes unlawfully encroach upon AEP Ohio's certified territory established under R.C. 4933.83(A). The relevant part of R.C. 4933.83(A) states that "* * * each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier[.]" R.C. 4933.83(A). The term, "electric supplier," under R.C. 4933.81(A), is defined as "* * * any electric light company as defined in section 4905.03 of the Revised Code, including electric light companies organized as nonprofit corporations, but not including municipal corporations or other units of local government that provide electric service." As discussed above, we 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). Accordingly, we find that AEP Ohio has failed to carry its burden of proving that NEP's operations at the Apartment Complexes violate the CTA.

c. Count III—Whether 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)?

{¶ 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 relevant part of R.C. 4928.08(B) states that "[n]o electric utility, electric services company, * * * shall provide a competitive retail electric service to a consumer in this state on and after the starting date of competitive retail electric service without first being certified by the public utilities commission * * * [.]" R.C. 4928.08(B). Under R.C. 4928.01(A)(11), "electric utility" means "an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state." R.C. 4928.01(A)(11). R.C. 4928.01(A)(7) states that an electric light company "has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company * * *[.]" R.C. 4928.01(A)(7). We have already determined that NEP does not qualify as an electric light company under R.C. 4905.03(C). As such, we must turn to the definition of electric services company under R.C. 4928.01(A)(9), which is "* * * an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. 'Electric services company' includes a * * * power broker, aggregator, * * *[.]" R.C. 4928.08(A)(9). R.C. Chapter 4928 does not define "power broker" or "aggregator," but the Commission rules do. Ohio Adm.Code 4901:1-21-01(CC) defines a power broker as meaning "* * * a person certified by the commission, who provides power brokerage." Ohio Adm.Code 4901:1-21-01(CC). Power brokerage, under Ohio Adm.Code 4901:1-21-01(DD), "means assuming the contractual and legal responsibility for the sale and/or arrangement for the supply of retail electric generation service to a retail customer in this state without taking title to the electric power supplied." Ohio Adm.Code 4901:1-21-01(DD). An "aggregator" under Ohio Adm.Code 4901:1-21-01(B), "means a person, certified

by the commission, who contracts with customers to combine the customers' electric load for the purpose of purchasing retail electric generation service on an aggregated basis." Ohio Adm.Code 4901:1-21-01(B).

{¶ 229} Under the CCSA, the landlord provided NEP sole discretion on whether to contract for an alternative commodity source (meaning a CRES provider instead of supply procured through AEP Ohio's default service) for the supply of electricity and authorized NEP to "* * * make the necessary arrangements with the applicable Utility or the Alternative Commodity Source to effectuate the switch * * *" (Ex. G at G-8-9 (CCSA 1.3.2, 1.3.3). However, Ms. Ringebach testified that "[w]hile NEP acts as the agent for the property, the property owner uses a PUCO licensed aggregator and broker to assist in obtaining retail electric supply as applicable for customers [i.e., landlords]" (NEP Ex. 90 at 42). Thus, NEP exercises its authority under the CCSA to contract with a Commission-certified power broker or aggregator, which we find does not violate R.C. 4928.08(B). She also stated that, "* * * NEP is in the process of applying for a broker certification from the Commission * * *" because "* * * certain customers have asked NEP to assist them in securing electric generation supply at locations where NEP does not otherwise provide any services such as submetering and does not act as the owner's agent" (NEP Ex. 90 at 42). The above scenario Ms. Ringebach illustrates is distinguishable from the Apartment Complexes since NEP provides submetering services at the properties. Furthermore, there is no evidence in the record demonstrating that NEP, in fact, operated as a power broker or aggregator at the Apartment Complexes. As such, we find that AEP Ohio has failed to carry its burden of proving that NEP's operations at the Apartment Complexes violates R.C. 4928.08(B).

d. Miller Act and the Stay Entry

{¶ 230} AEP Ohio also argues that the Commission should consider the Miller Act when making its decision. Under the Miller Act, no public utility shall abandon or be required to abandon or withdraw any electric light line or any portion thereof or the service rendered thereby without holding a hearing to ascertain the facts and determining that the

proposed abandonment is reasonable, having due regard for the welfare of the public and the cost of the operating facility. R.C. 4905.20, 4905.21. According to AEP Ohio, the Miller Act also applies to the abandonment or withdrawal of services from individual customer service lines. *State ex rel. Toledo Edison Co. v. City of Clyde*, 76 Ohio St. 3d 508, 516, 1996-Ohio-376, 668 N.E.2d 498 (1996) (citing *State ex rel. Klapp*, 10 Ohio St. 2d 14, 225 N.E.2d 230 (1967)). AEP Ohio argues that the conversion of the Apartment Complexes to master-meter service will result in the abandonment or withdrawal of electric lines serving the residents at the Apartment Complexes and the services rendered by those lines.

{¶ 231} The Complaint references the Miller Act only in one instance and does so when describing the regulatory compact entered into by AEP Ohio with its customers. Complaint at ¶ 4. We note that AEP Ohio's three counts within its Complaint do not specifically assert a Miller Act violation under R.C. 4905.20 and 4905.21. Moreover, regarding AEP Ohio's argument that the Stay Entry was a temporary remedy pending the ultimate outcome of this case and, thus, the Commission should now consider the Miller Act concerning the conversions of the Apartment Complexes, we find such argument unavailing. First, the conversions of the Apartment Complexes are completed, meaning any determination as to proper abandonment is moot. Second, AEP Ohio filed no separate application for abandonment for the Apartment Complexes based upon which we could make a decision. Therefore, any allegations related to the Miller Act will not be considered and should be dismissed.

{¶ 232} AEP Ohio also attempts to relitigate the Stay Entry in its initial brief (AEP Ohio Initial Br. at 135-142). The attorney examiner issued the Stay Entry on December 28, 2021. AEP Ohio filed an interlocutory appeal on January 3, 2022. On July 26, 2022, the attorney examiner certified the interlocutory appeal to the Commission for consideration. The Commission issued an Entry on July 27, 2022, denying AEP Ohio's interlocutory appeal and affirming the December 28, 2021 Entry issued by the attorney examiner. On August 26, 2022, AEP Ohio filed an application for rehearing of the Commission's July 27, 2022 Entry denying the interlocutory appeal. R.C. 4903.10 states that any party who has entered an

appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission. R.C. 4903.10. If the Commission does not grant or deny such application for rehearing within 30 days from the date of filing, the application for rehearing is denied by operation of law. R.C. 4903.10. The Commission did not grant or deny AEP Ohio's application for rehearing within 30 days of it being filed; therefore, the application for rehearing was denied by operation of law. Accordingly, AEP Ohio's arguments concerning the Stay Entry have already been thoroughly considered and need not be addressed for a third time in this Opinion and Order.

B. NEP Counterclaims

1. OVERVIEW OF NEP ARGUMENTS IN SUPPORT OF COUNTERCLAIMS

{¶ 233} On September 18, 2020, NEP contacted AEP Ohio in writing to notify AEP Ohio of the conversion of the five apartment complexes on behalf of the complex owners. In October of 2020, NEP employee Aaron Depinet, who manages metering and field operations for NEP, submitted work orders for conversion of the Apartment Complexes through an online portal. Mr. Depinet provided his contact information in the online portal so that AEP Ohio would contact him to move forward with the conversion. (NEP Ex. 91 at 4; Tr. VII at 1250-1251, 1277.) NEP then provided the specifics for these construction jobs and all other information required by AEP Ohio, including letters of authorization that included the property owners' information (Tr. VII at 1248-1251).

{¶ 234} NEP alleges that in early 2021, AEP Ohio created its submetering initiative aimed to convert submetered properties back to individual AEP Ohio residential accounts and to prevent future conversions by building owners and/or submetering companies. As part of this initiative, in approximately June 2021, a self-proclaimed "SWAT team" was formed to carry out this initiative. Members of the SWAT team consists of AEP Ohio employees Angie Engle, Liz Herzberg, Mike LaScola, and Checobia Crawford (customer

service representative), and Angie Rybalt (Director of Customer Experience), who heads the SWAT team. Jon Williams, AEP Ohio Managing Director, Customer Experience & Distribution Technology, is responsible for the SWAT team and submetering initiative. NEP avers that the SWAT team utilized AEP Ohio systems and customer information to carry out this initiative. (NEP Initial Br. at 17-19; Tr. II at 197, 249 - CONFIDENTIAL; Tr. III at 550, 660, 662; Tr. IV at 660, 663.)

{¶ 235} In Spring 2021, Mr. Depinet contacted AEP Ohio regarding the requested conversions. In this outreach, Mr. Depinet advised AEP Ohio that the start dates for the conversions would be October/November 2021. As of May of 2021, AEP Ohio had still not denied the conversion requests. At that time, it was the understanding of AEP Ohio representatives that AEP Ohio "cannot stop the property owner" from converting to master-meter service on the owner's property. On June 9, 2021, however, AEP Ohio notified NEP via email that AEP Ohio leadership would not permit its existing customers "…to be converted over to NEP or any other company." NEP stresses that this was the first time that AEP Ohio indicated any reluctance to process the conversion requests. NEP states that nothing in this communication referenced the recent *Wingo* decision or the basis for the denial. After NEP counsel reached out to AEP Ohio's counsel, and an internal meeting at AEP Ohio, a conference call between the parties was scheduled in hopes of resolving any issues, resulting in what NEP refers to as the "Green Light Meeting." (NEP Initial Br. at 19-20; NEP Ex. 91 at 4, Ex. A; NEP Ex. 25 at 1165; NEP Ex. 26; NEP Ex. 90 at 27, Ex. H.)

{¶ 236} This "Green Light Meeting" consisted of a conference call held on June 23, 2021. Participating AEP Ohio representatives included Jon Williams, Steve Nourse (General Counsel), and Angie Rybalt. NEP was represented on the call by Teresa Ringenbach (Vice President, Business Development), Drew Romig (Associate General Counsel), and Aaron Depinet (Senior Manager of Field Operations); as well as an engineer hired by NEP for these projects. According to NEP, during this call AEP Ohio reversed its denial of the conversion requests at the Apartment Complexes and decided it would send a letter to residents at the properties concerning the conversions. In-house NEP counsel followed up the next day

with an email to AEP Ohio to confirm that AEP Ohio no longer had objections to the requested conversions. NEP states that AEP Ohio did not respond with any dispute to the confirmation email. (NEP Ex. 90 at 27, Ex. H; Ex. 91 at 4; Tr. IV at 683.) In addition, NEP states that AEP Ohio did not dispute another confirmation in which NEP confirmed it had the "green light" to move forward with one of the projects (NEP Ex. 57 at 128).

{¶ 237} The day after the "Green Light Meeting," NEP points out that Jon Williams issued a directive as to how to move forward with the conversions, outlining five steps necessary to complete the requests. Mr. Williams stated that this was "[n]ot great news but current regulation allows it." In response, Ms. Rybalt responded with "next steps" for AEP Ohio to take in order to complete the conversions. (NEP Initial Br. at 22; NEP Ex. 27 at 1037; NEP Ex. 57 at 128.) Further, NEP points out that AEP Ohio staff then began working to carry out the conversions, working through the five steps that made up Mr. William's directive. One step of the directive was to send a letter to tenants at the Apartment Complexes to explain the conversions, and potential implications, to tenants. While NEP asserts that false information was included in the letter and that it was sent to certain tenants not affected by the conversions, NEP points out that the letter is additional proof that AEP Ohio was, at that time, fully committed to moving forward with the conversions. (NEP Initial Br. at 23; NEP Ex. 65; NEP Ex. 28; NEP Ex. 29.) NEP continued moving forward with necessary preparations to complete the conversions during the Summer of 2021, including site visits and communications with AEP Ohio staff. Additionally, AEP Ohio provided NEP with equipment to be installed during the conversions, including AEP Ohio's current transformers and meter sockets for master-meters. (NEP Initial Br. at 24; Tr. VII at 1199.) On September 3, 2021, Mr. Depinet reached out to AEP Ohio and expressed frustration at the lack of progress by AEP Ohio on the conversions. NEP points out that Ms. Rybalt was aware of this communication and responded to members of her team "we don't have a choice" as to whether to carry out the conversion requests. The importance of all of this activity in the Summer and Fall of 2021 is, in NEP's estimation, proof that AEP Ohio was

working with NEP and believed that the conversion requests were valid and had to be completed. (NEP Initial Br. at 24-25; NEP Ex. 60 at 346.)

{¶ 238} NEP asserts that the key determination of success of AEP Ohio's submetering initiative was revenue. NEP points to the August 2021 request from AEP Ohio senior management to the SWAT team to calculate and report on submetering loss revenues. Checobia Crawford (AEP Ohio's customer experience representative and SWAT team member) prepared a spreadsheet in late August/early September 2021 that provided the estimated revenue gained from conversions back to AEP Ohio service ($324,797) and estimated revenue lost from conversions from AEP Ohio service ($368,585). NEP notes that the estimated losses all came from the Apartment Complexes. According to NEP, the submetering initiative would have shown a net annual revenue of $92,779 if not for the estimated losses potentially incurred by the conversions of the Apartment Complexes. And, as set forth in those calculations, the loss would take effect on the scheduled conversion dates in October 2021, which AEP Ohio included in the spreadsheet. (NEP Initial Br. at 25-26; NEP Ex. 59 - CONFIDENTIAL; NEP Ex. 14; NEP Ex. 71; NEP Ex. 72 - CONFIDENTIAL; NEP Ex. 54.)

{¶ 239} Based upon this analysis AEP Ohio concluded that it would lose significant revenues if any of the Apartment Complexes converted to master-meter service. NEP states that AEP Ohio leadership had issued requests to the SWAT team for information regarding NEP and prior conversion requests. NEP states that a meeting was held on September 8, 2021, with its legal counsel, and AEP Ohio decided to put the requested conversions "on hold." (NEP Initial Br. at 26-27; NEP Ex. 61.) On September 24, 2021, AEP Ohio legal counsel (Steve Nourse) sent a letter to NEP denying the requests for conversions at the Apartment Complexes; AEP Ohio then filed the Complaint in this case on the same day. NEP states that the only basis for denial included in AEP Ohio's letter was the claim that NEP would be operating as a public utility if the conversions were completed and that this would result in violation of the CTA and numerous other regulations. (NEP Initial Br. at 27; NEP Ex. 24; Tr. III at 500.) NEP points out that this denial of the conversion requests and the filing of

the Complaint occurred over a year after NEP first approached AEP Ohio on the matter and after much correspondence and meetings between the parties that resulted in a "green light" to move forward. (NEP Initial Br. at 27-28; NEP Ex. 24; NEP Ex. 90 at 44; NEP Ex. 91 at 6.)

{¶ 240} NEP also highlights a November 10, 2021 email sent to a local real estate developer in which AEP Ohio staff summarizes their view of the Complaint and suggests that this could result in NEP no longer being able to operate within AEP Ohio's service territory. NEP asserts that AEP Ohio's communication falsely represented the status of the case and that, despite being aware of such inaccuracies, AEP Ohio viewed the disruptive nature of simply filing the Complaint could benefit the company. (NEP Initial Br. at 28-29; NEP Ex. 38; Tr. III at 450-451 - CONFIDENTIAL; Tr. IV at 740-743.)

{¶ 241} NEP says that it is aware of two properties similar to the Apartment Complexes that AEP Ohio agreed to convert to master-meter service during the period it denied the conversion requests at the Apartment Complexes – Oak Creek Apartments LLC and Worthington Square Acquisition LLC (collectively, the Champion Properties). NEP states that at essentially the same time that AEP Ohio was planning to deny the conversions at the Apartment Complexes, AEP Ohio was calculating meter removal costs at the Champion Properties and negotiating agreements to complete the conversions at these properties, which agreements were ultimately finalized. (NEP Initial Br. at 30; see NEP Exs. 2, 25, 26, 66 2; NEP Ex. 35 - CONFIDENTIAL; NEP Ex. 36 – CONFIDENTIAL; NEP Ex. 37; NEP Ex. 66 - CONFIDENTIAL.) NEP also points to other situations in which it claims that AEP Ohio has treated properties managed by NEP differently than other AEP Ohio customers. (NEP Initial Br. 29-31; NEP Ex. 33 - CONFIDENTIAL; Tr. II at 401 - CONFIDENTIAL.)

{¶ 242} NEP asserts two counterclaims and within each count identifies five violations that it avers support findings for NEP on both claims. With respect to Count I, NEP argues that the Commission should find that AEP Ohio violated R.C. 4905.26 through its discriminatory and preferential denial of the conversion requests at the Apartment

Complexes. NEP deems AEP Ohio's denials to be unjust, unreasonable, unjustly discriminatory, and unjustly preferential, in violation of R.C. 4905.26. NEP avers that R.C. 4905.26 prohibits such disparate treatment. (NEP Initial Br. at 12-13.) Similarly, with respect to Count II, NEP submits that the Commission should find that AEP Ohio violated R.C. 4905.35 by subjecting NEP and its customers to undue prejudice and disadvantage. This count centers on NEP's belief that AEP Ohio discriminatorily targeted NEP and the conversion requests at the Apartment Complexes. The alleged violations for each counterclaim are examined individually below. (NEP Initial Br. at 13.)

{¶ 243} NEP stresses that AEP Ohio's revenue—or, more specifically, the revenue that AEP Ohio loses when a customer converts to master-meter service—is the driving force in this entire proceeding. NEP submits that AEP Ohio's Complaint "cynically cloaks" its motive in alleged concern for protection of tenants, when the true concern is the loss of money on the part of AEP Ohio when landlords choose master-meter service. NEP argues that because it could not deny all of NEP's master-meter requests, AEP Ohio manufactured its reasoning for denying the requests to convert the Apartment Complexes. Because NEP is the largest provider of third-party submetering services in AEP Ohio's service territory, NEP believes that AEP Ohio specifically targeted NEP in hopes of increasing AEP Ohio revenue. Further, NEP avers that AEP Ohio unlawfully denied service to customers rightfully requesting master-meter service. In further support of its claims, NEP points out that this is the only Complaint related to submetering that AEP Ohio has ever filed and that these are the first instances in which AEP Ohio has denied a request to convert a property to master-meter service. (NEP Initial Br. at 79-81; Tr. II at 317, 342-343 - CONFIDENTIAL.)

2. OVERVIEW OF AEP OHIO ARGUMENTS AGAINST COUNTERCLAIMS

{¶ 244} AEP Ohio submits that, considering the specific tariff provisions in place at the time NEP's conversion requests came in as well as the ensuing process leading to AEP Ohio denying the requests, AEP Ohio's refusal to process the conversion requests at the Apartment Complexes was just, reasonable, and lawful if NEP is determined to be a public

utility. If NEP were deemed to be operating as a public utility, NEP's actions would have violated that tariff and the CTA. Thus, if AEP Ohio were to prevail in its claims, then NEP's counterclaims would be moot and need not be addressed. As detailed above, however, the Commission did not make such a finding and thoroughly addressing NEP's counterclaims is necessary. (AEP Ohio Initial Br. at 149-50.)

{¶ 245} In general, AEP Ohio dismisses the assertions in NEP's counterclaims by stating that NEP provides no evidence that AEP Ohio violated its tariff or that AEP Ohio is bound by prior practice with respect to submetering. AEP Ohio argues that its tariffs have a mirroring effect that only allow resale activities permitted by Ohio law. As such, the tariffs do not authorize NEP or a landlord to undertake unlawful resale. (NEP Ex. 88 at 7-8; NEP Ex. 90 at 30-32.) Because the status of third-party submetering companies became unclear following the *Wingo* remand, AEP Ohio avers that its determination that NEP would be violating Ohio law if the Apartment Complexes were converted was not unreasonable under the circumstances. Further, considering *Wingo*, AEP Ohio was trying to make a decision about how to handle the conversion requests based on the advice of counsel during the Summer of 2021; therefore, NEP's binding past practices argument is fundamentally flawed since the prior activities were based on the law at that time and the facts at that time, all of which had changed in the interim.

{¶ 246} AEP Ohio asserts that, at their core, NEP's two claims allege that AEP Ohio treated NEP discriminatorily. AEP Ohio insists that NEP's actions and business model present unique circumstances and conditions, meaning that, although NEP disagrees, AEP Ohio is placed in a position of competing to provide monopoly distribution services to multi-unit properties since landlords can choose either AEP Ohio or NEP to serve their tenants directly. In terms of the R.C. 4905.35 discrimination claim, AEP Ohio argues that NEP is not similarly situated with a landlord or property owner since NEP does not engage in the sale or rental of real estate but rather is similarly situated with other third-party submetering companies (NEP Ex. 89 at 3-4 - CONFIDENTIAL). AEP Ohio asserts that it does not treat NEP any differently than other third-party submetering companies. NEP

focuses on AEP Ohio's submetering initiative as an indica of discriminatory treatment; however, AEP Ohio contends that the SWAT team has a lawful and rational business purpose and does not treat NEP any differently than other third-party submetering companies such as American Power and Light (AP&L) (NEP Ex. 89 at 35-39, 44 - CONFIDENTIAL). The SWAT Team, in AEP Ohio's view, did not limit its focus to the properties involved in this case or only seek out properties where NEP was involved.

{¶ 247} Next, AEP Ohio asserts that NEP's attempt to create a narrative centered around AEP Ohio's nefarious intent to disrupt NEP's business amid fear of diminishing revenues is not true (NEP Ex. 89, 35-37 - CONFIDENTIAL). AEP Ohio argues that it filed this Complaint for two primary reasons: (1) AEP Ohio has grown increasingly concerned about third-party submetering practices "first and foremost" because AEP Ohio is legally obligated and entitled to provide a public service to its customers with a myriad of customer protections as afforded through the regulatory compact and processes contained in Title 49; and (2) to gain clarity on AEP Ohio's right to serve its customers because of its genuine concern about existing customers losing the protections and benefits of regulated service to which they have grown accustomed. (AEP Ohio Ex. 3 at 5-6.) Finally, in its reply brief, AEP Ohio asserts for the first time that NEP is improperly relying on R.C. 4905.26 as the source of a substantive right as opposed to it being a purely procedural vehicle for bringing a complaint to the Commission (AEP Ohio Reply Br. at 56-57).

3. COUNTERCLAIM I: FIVE ALLEGED VIOLATIONS OF R.C. 4905.26

{¶ 248} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law.

a. First Violation: AEP Ohio Allegedly Violated R.C. 4905.26 by Unilaterally Changing How It Applied Its Tariff Provisions on Resale of Energy Without Commission Authorization.

{¶ 249} NEP notes that conversion to master-meter commercial service is permitted under the express language of AEP Ohio's tariffs. AEP Ohio had two tariffs in effect in September 2021, when the Company refused to continue with the conversions at the Apartment Complexes. (NEP Initial Br. at 82; Tr. I at 150-151.) One was the Standard Service tariff for non-shopping customers and the other was the Open Access Distribution Service tariff for shopping customers. Both tariffs contained provisions that permitted the resale of energy by landlords and the use of master-meters by landlords. (NEP Initial Br. at 82-83; see NEP Exs. 4 and 5.) In November 2021, AEP Ohio issued an updated tariff that includes similar language concerning master-meter service and the ability of landlords to resell electricity to tenants. The new tariff was approved by the Commission and became effective December 1, 2021. The language in these various forms of the tariff did not substantively change these sections. Importantly for NEP, AEP Ohio's tariff does not distinguish property owners who master-meter properties themselves, using their own employees, from property owners who hire third-party contractors to manage submetering. Further, NEP argues that nothing in the tariff allows AEP Ohio to treat a request for conversion to master-meter service differently than similar new construction requests. (NEP Initial Br. at 84-85; see NEP Ex. 3; NEP Ex. 4 at ¶ 18 - CONFIDENTIAL.)

{¶ 250} NEP notes that AEP Ohio witness Williams admitted at hearing that submetering at multi-family properties was occurring in AEP Ohio's service territory prior to the Commission's approval of the modified *Shroyer* test. In addition, NEP submits that there has been no change in the law that would alter the application of AEP Ohio's tariff and that the Supreme Court's decision in *Wingo* did not disrupt the continued non-discriminatory application of AEP Ohio's tariff. The Supreme Court of Ohio held that the Commission must determine whether it has jurisdiction based on the jurisdictional statute, not the modified *Shroyer* test. The original *Shroyer* test which the Commission used for years

was not explicitly overturned. (NEP Initial Br. at 86; Tr. II at 308 - CONFIDENTIAL; NEP Ex. 12; *Wingo* at ¶ 26.)

{¶ 251} NEP recounts the internal discussions within AEP Ohio in which AEP Ohio begrudgingly accepted that the conversion requests at the Apartment Complexes could not be stopped. Throughout internal AEP Ohio emails, phrases such as "cannot stop the property owner," "we unfortunately can't stop them," "we cannot stop them," "not great news but current regulations allow it," and "we don't have a choice" abound. (NEP Initial Br. at 86-87; NEP Ex. 25 at 1165; NEP Ex. 30 at 359; NEP Ex. 27 at 1037; NEP Ex. 60 at 346.) Despite this understanding, as well as the discussions it had with NEP that indicated that the conversions could move forward, AEP Ohio denied the requests and filed a complaint against NEP on September 24, 2021. NEP contends that AEP Ohio took this action only after its leadership reviewed financial losses of the submetering initiative due to conversions at the Apartment Complexes. NEP argues that with AEP Ohio's denial of the conversion requests at the Apartment Complexes, AEP Ohio unilaterally and without Commission approval altered its tariffs related to master-meter service. NEP avers that this denial of the conversions at the Apartment Complexes, and the reasoning provided in support, constitute disparate treatment toward NEP that is unlawful and unreasonable under R.C. 4905.26. (NEP Initial Br. at 87-88.)

{¶ 252} AEP Ohio responds that NEP relies on a "tortured reading" of AEP Ohio's tariffs and past practices, along with inapt comparisons and incomplete factual recitations. In some instances, according to AEP Ohio, NEP fails to even identify which portion of R.C. 4905.26 was allegedly violated. (AEP Ohio Reply Br. at 57.) AEP Ohio first submits that, on their face, its tariffs provided the Company with the authority to deny the requests to convert the Apartment Complexes. AEP Ohio does not dispute the tariff language repeated by NEP; it does, however, point out that NEP is not a landlord. AEP Ohio asserts that this fact alone is dispositive of this counterclaim. Even so, AEP Ohio states that the tariff prohibits resale of electricity if an entity is acting as a public utility. AEP Ohio believes that the *Wingo* decision threw the definition of a public utility "into flux." While NEP argues

that *Wingo* only overturned modified *Shroyer*, not the original *Shroyer* test or other precedent on submetering, AEP Ohio believes this to be a simplistic reading of the Court's opinion. AEP Ohio states if original *Shroyer* still applied, the Court could have remanded the case and told the Commission to apply that test. The Court did not do that, however, and instead directed the Commission to determine jurisdiction based on the statutory language of R.C. 4905.03. (AEP Ohio Reply Br. at 58-59; AEP Ohio Ex. 2 at Ex. JLM-1; NEP Ex. 89 at Ex. L - CONFIDENTIAL.)

{¶ 253} AEP Ohio also stresses that its tariffs have a mirroring effect to only permit resale activities that are permitted by Ohio law. Additionally, AEP Ohio highlights Section 26 of the tariff's Terms and Conditions, which allowed AEP Ohio to refuse service if a nonresidential customer is doing something unlawful. AEP Ohio avers that Section 26 supports AEP Ohio's determination that unlawful resale is prohibited under the tariff and that this was a valid basis for denying NEP's requests, based upon its understanding of Ohio law following *Wingo*. (AEP Ohio Reply Br. at 59; NEP Ex. 4 at ¶ 26 - CONFIDENTIAL; NEP Ex. 5 at ¶ 26; Tr. I at 146.)

{¶ 254} With respect to past practices, AEP Ohio argues that societal shifts, evolution of law, and the development of specific facts all must be included as part of any analysis. AEP Ohio feels that NEP failed to carry its burden of establishing that AEP Ohio's prior actions are pertinent as to whether AEP Ohio's denial of NEP's requests to convert the Apartment Complexes was unreasonable or unlawful. AEP Ohio states that NEP ignores important distinctions, such as the difference between landlord activity and third-party submetering companies and condominium associations, any changes in facts or business models over the time period, and most importantly, any changes in law or regulations. AEP Ohio reiterates that the law "fundamentally changed" with the *Wingo* decision, which was issued only two months after NEP's conversion requests. AEP Ohio states that this fundamental change required AEP Ohio to reassess its analysis of NEP's request. Thus, AEP Ohio argues that any NEP references to AEP Ohio's actions prior to the Commission's

adoption of the modified *Shroyer* test are inapplicable in the current case. (AEP Ohio Reply Br. at 60-61.)

{¶ 255} AEP Ohio characterizes NEP's reliance on internal emails of non-legal employees as "a final desperate attempt to establish a legal interpretation of AEP Ohio's tariffs that suits the NEP narrative." AEP Ohio states that such informal internal emails do not have any bearing on the applicability and legal interpretation of AEP Ohio's tariffs. Further, the witnesses sending these emails admitted in testimony that they had not consulted the company's legal counsel prior to making such statements. (AEP Ohio Reply Br. at 61-62; Tr. II at 359, 366-368 - CONFIDENTIAL; Tr. IV at 710; see NEP Ex. 27.)

{¶ 256} On the first alleged violation of Count I, the Commission finds that NEP failed to establish a violation of R.C. 4905.26. AEP Ohio's tariff explicitly prohibits the resale of electricity by an entity that is operating as a public utility or is otherwise violating Ohio law in such actions. (NEP Ex. 4 at ¶ 26 - CONFIDENTIAL; NEP Ex. 5 at ¶ 26.) While the Stay Entry is evidence that the Commission found AEP Ohio's decision to abruptly deny the conversion requests at the Apartment Complexes to be rash, the Commission does not believe that it was unlawful or unreasonable for AEP Ohio to pause such conversions while awaiting a decision in the remanded *Wingo* case or for other Commission guidance. As outlined above in our conclusions regarding the Complaint, the Commission disagrees that *Wingo* was a "sea change" in the law regarding submetering. However, the voluminous case docket and the weeks-long evidentiary hearing in this case (not to mention the extensive analysis undertaken in this Order) confirm that there was a genuine outstanding question as to whether NEP would be deemed to be operating as a public utility at the Apartment Complexes. To the extent that the Company's decision was improper, the Stay Entry (as modified) remedied the issue by directing AEP Ohio to proceed with the requested conversions at the Apartment Complexes (Stay Entry at ¶ 31; Entry (July 27, 2022) at ¶ 48). Indeed, the attorney examiners determined as much in denying NEP's motion to dismiss and finding grounds existed for the Commission's consideration of the Complaint. As stated in that Entry, the issue of whether AEP Ohio must reconfigure the Apartment

Complexes, and ultimately other future properties, for NEP submetering was properly before the Commission via the Complaint. Thus, there was at least the possibility that NEP would now be found to be illegally reselling electricity, which is prohibited under any reading of AEP Ohio's tariff. (Entry (Jan. 31, 2022) at ¶¶ 23, 26.) To avoid violating its own tariff, AEP Ohio halted conversions and ultimately brought this Complaint to obtain clarity from the Commission. Because the *Wingo* decision did create uncertainty as to NEP's status as a public utility, NEP's argument for strict adherence to informal past practices by AEP Ohio is likewise unconvincing. (AEP Ohio Ex. 2 at 3-4, Ex. JLM-1; AEP Ohio Ex. 3 at 5.)

{¶ 257} The Commission is also not persuaded by NEP's reliance on internal AEP Ohio emails in which non-legal staff expressed opinions that the conversions must go forward. NEP advances this argument after much of its briefing reiterates that unilateral interpretations of Ohio law and the Company's tariffs made by AEP Ohio employees are irrelevant because it is the Commission that must make such determinations. Nevertheless, as AEP Ohio points out, informal internal emails such as these made by witnesses who testified that they did not consult legal counsel before making such statements do not substantiate NEP's claim. (NEP Ex. 27; Tr. II at 360, 366-368 - CONFIDENTIAL; Tr. IV at 710.)

{¶ 258} For the foregoing reasons, the Commission finds that NEP failed to establish its first alleged violation of R.C. 4905.26.

b. Second Violation: AEP Ohio's New Policy of Basing Approval of Requests to Convert to Master-Meters Upon Whether a Property Owner Utilizes a Third-Party Submetering Company Violates R.C. 4905.26.

{¶ 259} Because it is undisputed that landlords are allowed to utilize master-meter service under AEP Ohio's tariff, NEP argues that AEP Ohio cannot apply its tariffs discriminatorily based upon the type of request for master-meter service. As part of the September 24, 2021 denials of the requests for conversion at the Apartment Complexes, NEP states that AEP Ohio adopted a new policy that divides requests into three categories:

(1) AEP Ohio planned to allow all property owners already submetered to continue with master-meter service; (2) AEP Ohio planned to approve all property owner requests for master-meter service at new construction locations; and (3) AEP Ohio would deny property owner requests to convert existing buildings, unless the property owner agreed not to contract with a third-party submetering company. NEP argues that R.C. 4905.26 is violated by this categorization, as the master-meter service to be received by properties under each category is substantively the same but AEP Ohio treats the requests differently. NEP submits that AEP Ohio's tariff makes no distinction between a "conversion" request from a "new build" or any other type of request. To make such distinctions is discriminatory, according to NEP. NEP states that AEP Ohio cannot assume the role of the Commission or the Supreme Court of Ohio to unilaterally alter the application of its tariff and to do so is unlawful and unreasonable. (NEP Initial Br. at 88-89; NEP Ex. 6 at ¶ 11.)

{¶ 260} AEP Ohio responds to this second alleged violation by stating that NEP fails to establish, pursuant to R.C. 4905.26 or 4905.35, that the conversion of existing AEP Ohio customers is substantially similar to processing third-party submetering requests for new builds. AEP Ohio states that "[o]ut of the utmost consideration for customers" it decided to limit the scope of this case to conversion of existing customers served by AEP Ohio. AEP Ohio states that NEP has attempted to twist this limited approach to demonstrate that AEP Ohio discriminately applied its tariffs to different types of submetering requests. AEP Ohio argues that this claim fails because it is based upon a false premise that all types of third-party submetering requests are substantially similar and that there is no reasonable basis to treat them differently. AEP Ohio submits that converting existing AEP Ohio customers is not "substantively the same" as third-party submetering being established at newly-built properties. AEP Ohio states that the types of requests like those submitted by NEP severs AEP Ohio's existing relationship with customers and results in those customers losing a number of regulated protections and services. (AEP Ohio Reply Br. at 62-64; Tr. III at 446 - CONFIDENTIAL; AEP Ohio Ex. 3 at 5-7, 9-10, 19-20.)

{¶ 261} Further, even if the Commission did find that the requests are substantially similar, AEP Ohio avers that there is a reasonable basis to treat requests for third-party submetering greenfield builds differently than requests to convert existing AEP Ohio customers to third-party submetering. To ensure that all customers within its territory have adequate and reliable electricity, AEP Ohio felt it appropriate to limit its denial of third-party submetering requests to those seeking to convert existing customers because AEP Ohio did not want to deny customers at new properties of service from moving forward pending a ruling on these issues by the Commission. (AEP Ohio Reply Br. at 64; Tr. III at 446-447 - CONFIDENTIAL.)

{¶ 262} With respect to the second alleged violation of Count I, the Commission finds that NEP has met its burden of proof establishing a violation of R.C. 4905.26 on a narrow and limited basis. The Commission reiterates that, after an intense, in-depth review of NEP's arrangement with the Apartment Complexes, it has found that AEP Ohio failed to demonstrate that NEP was acting as a public utility in its provision of third-party submetering services, based on the facts and circumstances presented in this proceeding. However, AEP Ohio does not dispute that it modified its policy to now effectively deny property owner requests to convert existing buildings to master-meter service, unless they agreed to not contract with a third-party submetering company. This blanket denial policy is unfounded and unreasonable, at the very least to the extent it applies to NEP. In the event AEP Ohio suspects any third-party submetering company of encroaching on the statutory line of operating as a public utility, AEP Ohio will have the same appropriate recourse as it took in this proceeding. However, it is the Commission, and not AEP Ohio, to ultimately decide whether those actions rise to the level of acting as a public utility and that determination necessarily falls on the facts and circumstances raised in each case. Our findings regarding AEP Ohio's Complaint contravenes, at the very least, the need for a blanket policy denying the ability of property owners to contract with NEP for third-party submetering services at existing properties and, if anything, supports AEP Ohio's former policy of reviewing whether a conversion request was appropriate on the circumstances at

hand. We note that we have admonished parties' after-the-fact attempts to justify denial of consumer requests in prior cases. See, e.g., *In re the Complaint of Cleveland Metropolitan School Dist. V. The Cleveland Elec. Illum. Co.*, Case No. 18-1815-EL-CSS, Opinion and Order (Apr. 20, 2022); *In re the Complaint of I. Schumann & Co., LLC v. Cleveland Elec. Illum. Co.*, Case No. 17-473-EL-CSS (*Schumann*), Opinion and Order (Oct. 3, 2018). Although we find it was not unreasonable for AEP Ohio to pause the conversion request for the Apartment Complexes in order to await further Commission guidance, there is no doubt that the conversion request was the catalyst that initiated the policy change on a forward-looking basis. Ironically, imposing such a policy change in the midst of this dispute seems to run contrary to AEP Ohio's desire to wait for further Commission guidance on the issue. Entry (July 27, 2022) at ¶ 48. Finally, with the additional language we are directing to be included in AEP Ohio's tariffs, we find AEP Ohio's concerns regarding consumer protections have been effectively addressed. As such, in order to provide AEP Ohio the clarity it desired by filing the Complaint, we find that AEP Ohio's newfound policy of basing approval of conversion requests to master-meter service upon whether a property owner decides to utilize the services of a third-party submetering company, to the extent it applies to the services and operations of NEP as described in this Order, violates R.C. 4905.26. (NEP Initial Br. at 88-89; NEP Ex. 6 at ¶ 11.)

c. Third Violation: AEP Ohio Allegedly Violated R.C. 4905.26 by Denying the Conversion Requests Solely Because the Customers at the Apartment Complexes Were Utilizing NEP's Services.

{¶ 263} NEP argues that AEP Ohio further discriminates against customers requesting master-meter conversions based upon whether an owner contracts with a third-party submetering company. NEP submits that R.C. 4905.26 does not permit public utilities to be unduly preferential in application of its services, and approving or denying requests for service that AEP Ohio must provide under its tariff based exclusively on the requesting party's private business relationships is certainly "unduly preferential." (NEP Initial Br. at 90.) As an example of discriminatory and preferential treatment, NEP points to AEP Ohio's

approval of the conversion requests at the Champion Properties at the same time that it denied the requests at the Apartment Complexes. The agreement to master-meter these two properties was finalized on March 11, 2022. The agreement prohibits the Champion Properties from contracting with NEP or otherwise permitting NEP or any other submetering company to be involved in any way with submetering at the properties. NEP notes that the contract does not prohibit the Champion Properties from utilizing other third-party contractors for conversion construction services (which NEP provides). NEP argues that approval or denial of master-meter conversion requests based upon third-party contractual relationships is unjust, unreasonable, discriminatory, and preferential. (NEP Initial Br. at 90-91; AEP Ohio Ex. 3 at Ex. JFW-2; NEP Ex. 37 at ¶ 5 – CONFIDENTIAL; NEP Ex. 66 - CONFIDENTIAL; NEP Ex. 90 at Ex. D.)

{¶ 264} AEP Ohio first notes that this claim essentially mirrors the alleged third violation of R.C. 4905.35 in Count II of the counterclaims. AEP Ohio responds that NEP ignores material factual and legal distinctions between the Champion Properties and the Apartment Complexes. Further, AEP Ohio stresses that it does not only oppose NEP's business, but equally opposes all third-party submetering companies. The key distinction for AEP Ohio is that the conversions at the Champion Properties are governed by a settlement agreement between the owners of the Champion Properties and AEP Ohio. This settlement agreement expressly prohibits the owners from contracting with a third-party submetering company to handle submetering operations and requires annual certifications of compliance with this condition. (AEP Ohio Ex. 3, Ex. JFW-2 at ¶ 5.) AEP Ohio asserts that this will ensure that submetering operations at the Champion Properties will fit within the original form of submetering recognized in *Wingo* (i.e., no third-party "big business" operation). Further, AEP Ohio argues that the settlement agreement shows that AEP Ohio distinguishes conversion requests between those made by property owners themselves and those made by third parties – not among third-party submetering companies. As AEP Ohio considers any submetering performed by a third-party company to be illegal under Ohio law and AEP Ohio's tariffs, AEP Ohio argues that the conversions at the Champion

Properties and those at the Apartment Complexes are not substantially similar circumstances and, therefore, no discrimination occurred. AEP Ohio dismisses NEP's attempts to draw comparisons between the Apartment Complexes and the Champion Properties based upon certain business practices, arguing that there is no evidence in the record to establish such similarities. (AEP Ohio Reply Br. at 64-66; see AEP Ohio Ex. 3 at JFW-2; NEP Ex. 66 - CONFIDENTIAL.)

{¶ 265} With respect to the third allegation of Count I, the Commission finds that NEP failed to establish a violation of R.C 4905.26. The Commission notes that this alleged violation, and the arguments made by NEP, largely mirror those in support of the third alleged violation of Count II, but this conclusion will attempt to specifically address the allegation in the context of R.C. 4905.26. Echoing the reasoning presented above in our findings on the first alleged violation, the Commission again notes that the size of this case docket and the exceptional contentiousness of virtually every issue or fact that arose in this case reinforce that there was a genuine question as to the status of NEP as a public utility. Thus, AEP Ohio's negotiated agreement with the Champion Properties represents a not unreasonable approach to directly addressing submetering with particular property owners (AEP Ohio Ex. 3 at JFW-2). However, given the Commission's findings in this case, continued denial of conversion requests simply because the property owner chooses to utilize the third-party submetering services of NEP, as described in this Order, will run contrary to our decision today. Accordingly, like our previous conclusions addressing the first alleged violation, we find that this third alleged violation of R.C. 4905.26 fails.

d. Fourth Violation: AEP Ohio Allegedly Violated R.C. 4905.26 by Charging for Meter Removal Fees Not Authorized Under the Tariff and Did So in a Discriminatory Manner.

{¶ 266} NEP argues that AEP Ohio's tariff does not include meter removal fees in master-meter configurations. Even if AEP Ohio's tariff permitted meter removal fees, NEP asserts that AEP Ohio has failed to charge its removal fees evenly – some customers converting to master-meter service have been charged while others have not. (NEP Initial

Br. at 91-92; see NEP Ex. 3, NEP Ex. 4, NEP Ex. 5, NEP Ex. 33 - CONFIDENTIAL; Tr. IV at 767; Tr. II at 401, 405 - CONFIDENTIAL.)

{¶ 267} First, AEP Ohio responds that its tariffs clearly permit the charging of so-called meter removal fees (NEP Ex. 3 at ¶ 12). Despite the thousands of emails produced by it during discovery, AEP Ohio notes that NEP relies upon a single email chain that indicates that AEP Ohio may not have charged a meter removal fee at a particular location. First, AEP Ohio responds that this was an internal email thread discussing the location. Second, AEP Ohio states that there is no evidence in the record as to whether a removal fee was ultimately charged at this location. Regardless, even if a removal fee was not charged in this instance, AEP Ohio asserts that this location was not similarly situated to NEP and thus there is no viable claim of discrimination. Finally, even if NEP was able to prove discriminatory intent, AEP Ohio counters that there was a reasonable basis for the conclusion reached by its staff. (AEP Ohio Reply Br. at 67-69; NEP Ex. 33 - CONFIDENTIAL.)

{¶ 268} With respect to the fourth allegation of Count I, the Commission finds that NEP failed to establish a violation of R.C 4905.26. Again, the Commission notes that this allegation largely mirrors that of the fourth alleged violation of Count II, but this conclusion will attempt to specifically address the allegation in the context of R.C. 4905.26. AEP Ohio's tariff does contain language which permits the Company to charge a customer for work performed on the Company's property at the request and convenience of a customer which results in the relocation of AEP Ohio equipment, which would cover the removal of the Company's meters (NEP Ex. 3 at ¶ 12). Further, AEP Ohio is correct that the record does not actually reflect whether a meter removal fee was or was not charged at the site highlighted by NEP. Thus, it is difficult to conclude that the Company acted unlawfully or unreasonably when it has not been established precisely how it acted. On this basis alone, the fourth alleged violation of R.C. 4905.26 fails.

e. Fifth Violation: AEP Ohio Allegedly Violated R.C. 4905.26 by Disseminating False Information to Customers at Multi-Family Properties.

{¶ 269} NEP submits that AEP Ohio also violated R.C. 4905.26 by sending false communications to customers, including communications regarding NEP and NEP's business model. NEP asserts that, despite actual knowledge that these statements were incorrect, AEP Ohio did not correct its statements. (NEP Initial Br. at 92.) As part of AEP Ohio's June 24, 2021 directive to move forward with the conversions at the Apartment Complexes, AEP Ohio prepared and sent letters to the affected tenants. The letter was sent on July 16, 2021, and, according to NEP, contained incorrect information. The letter told tenants that if they then participated in certain AEP Ohio programs such as HEAP, they would lose access to that program. After the PUCO staff questioned such information, AEP Ohio admitted that this representation was incorrect. NEP says that AEP Ohio prepared a letter to correct the error but never sent it to tenants. (NEP Initial Br. at 92-93; NEP Ex. 28; NEP Ex. 29; NEP Ex. 21.)

{¶ 270} NEP states that on multiple occasions AEP Ohio misrepresented or made false statements to its customers about submetering and NEP. Furthermore, NEP points out November 2021 communications in which AEP Ohio made statements concerning this proceeding. NEP asserts that the representations made by AEP Ohio in these emails were misrepresentations regarding the status and results of this case. While AEP Ohio recognized such inaccuracies, NEP does not believe that they were ever corrected. (NEP Initial Br. at 93; NEP Ex. 74 - CONFIDENTIAL at 209; Tr. III at 450-451 - CONFIDENTIAL.)

{¶ 271} AEP Ohio argues that NEP failed to carry its burden of establishing that AEP Ohio spread false information about NEP or that it in any way harmed NEP. First, AEP Ohio submits that NEP cited no legal precedent as to how these statements amount to an actionable claim nor how they violate R.C. 4905.26. If it is assumed that there is an actionable claim, AEP Ohio asserts that NEP still fails to carry its burden of proof. With respect to the June 16, 2021, letter to residents, the error was very minor—the letter erroneously telling customers that they would no longer be eligible for emergency energy assistance after

conversion. While NEP states that the error was never corrected, AEP Ohio counters that NEP never proved that a corrected letter was not sent to customers; AEP Ohio witness Williams stated that it was possible that the letter was sent. Even more importantly, NEP never established how this information in any way harmed customers or affected NEP's ability to convert the Apartment Complexes. With respect to the communications with developers, AEP Ohio asserts that NEP failed completely to establish that the information therein was incorrect or misleading. In fact, AEP Ohio states that NEP never identifies any specific statement in the documents which was inaccurate. The email relied upon by NEP for this claim contained basic facts about this case in response to an email from the developer, not the weaponization of the Complaint as alleged by NEP. (AEP Ohio Reply Br. at 69-70; NEP Exs. 28, 29; Tr. II at 369, 373 - CONFIDENTIAL; NEP Ex. 29; NEP Exs. 38 and 74 - CONFIDENTIAL.)

{¶ 272} With respect to the fifth allegation of Count I, the Commission finds that NEP failed to establish a violation of R.C 4905.26. As AEP Ohio rightly points out, NEP is unclear as to how any of the actions forming the basis for this alleged violation constitute an actionable claim under R.C. 4905.26. Other than general reference to "a separate violation of R.C. 4905.26" for each class of alleged false statement, there is no indication as to how the letter to tenants or email correspondence to property developers violated a specific part of R.C. 4905.26. This failure to meet its evidentiary burden is alone sufficient to deny this allegation. However, even if that flaw can be ignored, the Commission agrees that errors identified in the letter to tenants would not rise to the level of the type of unreasonable or unlawful behavior that NEP alleges elsewhere in its counterclaims. Further, there is no evidence in the record as to how any tenants were harmed by these communications or how it affected the business of NEP. As repeated throughout, once the Stay Entry was issued, the Apartment Complexes were converted (or in the process of being converted) to master-meter service (Stay Entry at ¶ 31; Entry (July 27, 2022) at ¶ 48); Tr. VII at 1213-1214). For the email communications highlighted by NEP, there is no indication as to which portions were false. Particularly with NEP Ex. 38, the statements from AEP Ohio employees are in

response to a query from a developer concerning submetering at properties. As part of the Company's response, it made the developer aware of this proceeding. While the explanation offered may have been slanted toward AEP Ohio's assessment of the status of third-party submetering companies, it is far from the type of "weaponization" of the Complaint alleged by NEP. (*See* NEP Ex. 38.) Therefore, the Commission finds that NEP did not meet its evidentiary burden to establish that any of the actions outlined in this section violated R.C. 4905.26.

4. COUNTERCLAIM II: FIVE ALLEGED VIOLATIONS OF R.C. 4905.35

{¶ 273} R.C. 4905.35(A) prohibits a public utility from "mak[ing] or giv[ing] any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage." The Ohio Supreme Court has construed discrimination claims to require a showing that a public utility failed to provide "'a like and contemporaneous service under substantially the same circumstances and conditions.'" (*In re Application of Columbus S. Power Co.*, 147 Ohio St. 3d 439, 2016-Ohio-1608, 67 N.E.3d 734 (2016) at ¶ 61 (quoting *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 328 (2006) at ¶ 24)).

{¶ 274} NEP asserts that AEP Ohio's denial of the conversion requests at the Apartment Complexes, as well as AEP Ohio's subsequent actions— including the filing of this Complaint, violate R.C. 4905.35. Many of the facts that form the basis of AEP Ohio's alleged violations of R.C. 4905.26 also form the basis of this count. NEP submits that AEP Ohio cannot give or subject any entity to undue preference or disadvantage under R.C. 4905.35. Specifically, R.C. 4905.35(A) prohibits AEP Ohio from making or giving any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subjecting any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage. NEP states that R.C. 4905.35 prohibits discrimination that lacks a

reasonable basis and that an increase in revenue by AEP Ohio is not a reasonable basis for discrimination. (NEP Initial Br. at 94.)

{¶ 275} AEP Ohio stresses the "substantially the same circumstances and conditions" portion of the Ohio Supreme Court's decision in *Columbus S. Power Co.*, pointing out that NEP must show that AEP Ohio's actions involved the same circumstances between similarly situated entities. (See also *Ohio Edison Co. v. Pub. Utilities Comm'n*, 1997-Ohio-196, 78 Ohio St. 3d 466, 678 N.E.2d 922 (citing *Columbus v. Pub. Util. Comm.* (1992), 62 Ohio St.3d 430, 437–438, 584 N.E.2d 646, 651). Moreover, the Supreme Court of Ohio has held that under R.C. 4905.35(A) "discrimination is not prohibited per se but is prohibited only if without a reasonable basis." *In the Matter of the Complaint of Cleveland Metro. Sch. Dist., Complainant*, Case No. 18-1815-EL-CSS, Opinion and Order (Apr. 20, 2022) at ¶ 100 (quoting *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 207 (1994)). AEP Ohio argues that NEP does not carry its burden of establishing that AEP Ohio failed to provide like and contemporaneous service under substantially the same circumstances and conditions in comparison with other similarly situated entities. To the extent any bias can be shown, AEP Ohio avers that NEP fails to show that any preference is discriminatory treatment that was undue or unreasonable. (AEP Ohio Reply Br. at 71.)

a. First Violation: AEP Ohio Allegedly Violated R.C. 4905.35 by Denying the Conversion Requests at the Apartment Complexes to Prevent the Owners from Using NEP for Submetering Services and to Avoid AEP Ohio Revenue Loss Based on a Change in Service.

{¶ 276} NEP believes that AEP Ohio unduly prejudiced NEP and its customers through the discriminatory application of its tariff against the owners of the Apartment Complexes. Prior to the denial at the Apartment Complexes, NEP asserts that AEP Ohio did not reject any similarly situated conversion projects under its tariff. NEP points to the two conversions to master-meter service at Ponderosa Village and Bantry Bay Village that AEP Ohio approved just three months prior to denial of the requests at the Apartment Complexes. According to NEP, other than the scale and the size of the revenue impact on AEP Ohio, there is no difference between the prior requests for master-meter service at properties managed by NEP and requests at the Apartment Complexes. Basing decisions to approve or deny conversion requests on revenue impacts is, according to NEP, unduly and unreasonably prejudicial. (NEP Initial Br. at 95; NEP Ex. 92 at 2; NEP Ex. 78 - CONFIDENTIAL; NEP Ex. 61.)

{¶ 277} AEP Ohio responds that NEP neglects to mention key legal developments germane to this case that occurred during the period described by NEP. AEP Ohio points out that the conversion requests for Bantry Bay and Ponderosa Village were submitted in early 2020, which was almost a year before the *Wingo* decision, and were completed by June 2021. Thus, AEP Ohio counters that NEP's reliance on conversions at those properties is misplaced because the *Wingo* decision was issued between AEP Ohio's decision to allow those two conversions and the subsequent denial of NEP's requests. AEP Ohio felt it inappropriate to disrupt the processes that were already well on the way to completion, as opposed to the Apartment Complexes that had not yet commenced with the conversions. Further, AEP Ohio states that Bantry Bay and Ponderosa Village were "discreet projects" that did not involve the exceptional number of properties and customers at issue at the Apartment Complexes. (AEP Ohio Reply Br. at 72; AEP Ohio Ex. 3 at 18; Tr. III at 541-542, 545.)

{¶ 278} With respect to the first allegation of Count II, the Commission finds that NEP failed to establish a violation of R.C 4905.35. The timeline of when NEP's requests were made in comparison to those at Bantry Bay and Ponderosa Village is important – as AEP Ohio points out, those two requests were made in early 2020, nearly a year prior to the *Wingo* decision. Thus, the *Wingo* decision was issued between the time that AEP Ohio approved the Bantry Bay and Ponderosa Village requests and the denial of NEP's requests. (Tr. II at 329 - CONFIDENTIAL.) As repeated throughout this Order, post-*Wingo* there was a legitimate question as to whether NEP would be deemed to be operating as a public utility at the Apartment Complexes (Entry (Jan. 31, 2022) at ¶¶ 23, 26.). Based on this timeline, it was not an unreasonable decision to pause new conversion requests such as NEP's at the Apartment Complexes, while believing that older, already-approved requests such as at Bantry Bay and Ponderosa Village should not be halted. With respect to any discrimination against NEP specifically, as will be discussed below in greater detail, the record clearly reflects that AEP Ohio opposed moving forward with any similar conversion requests made by third-party submetering companies at that time, not only those made by NEP. As a result, NEP failed to meet its burden to establish that this alleged violation violated R.C. 4905.35.

b. Second Violation: AEP Ohio Allegedly Violated R.C. 4905.35 by Implementing a New and Unauthorized Policy of Denying Conversion Requests that Involved Third-Party Submetering Service Providers, Subjecting NEP and Its Customers to Undue and Unreasonable Prejudice and Disadvantage.

{¶ 279} NEP again describes the three categories of submetering conversion requests that AEP Ohio adopted in September 2021 – (1) allow currently submetered properties to continue; (2) approve submetering requests at new construction properties; and (3) deny conversion requests at buildings not currently master-metered if the owner is contracting with a third-party submetering company. NEP argues that, in effect, AEP Ohio is allowing property owners in the first two categories to contract with third-party submetering companies but denying this right to those owners in the third category, such as owners at the Apartment Complexes. (NEP Initial Br. at 95-96; NEP Ex. 6 at ¶ 11.) NEP believes that

this activity constitutes an "undue and unreasonable preference" prohibited by R.C. 4905.35. (NEP Initial Br. at 96 citing *Ameritech Ohio v. PUC*, 86 Ohio St. 3d 78, 81, 1999- Ohio-349, 711 N.E.2d 993, (1999)).

{¶ 280} AEP Ohio responds that its limiting denials of conversions to the Apartment Complexes while continuing to process third-party submetering requests for greenfield projects is insufficient to form the basis of a claim for violation of R.C. 4905.35. AEP Ohio states that NEP raises no new arguments beyond what they already raised in support of the second violation alleged under Count I of the counterclaims. AEP Ohio, therefore, disregards this allegation of discrimination based on a "new policy" of denying requests for conversions of existing AEP Ohio customers by third-party submetering companies for the same reasons outlined above in response to the alleged violation of R.C. 4905.26 (See Section IV.B.d.ii above.) Particularly important for Count II, however, is that AEP Ohio stresses that it has concerns about all forms of third-party submetering, but the Complaint was crafted in the manner that it was because it is particularly concerned about the impacts of conversion on existing AEP Ohio customers. Further, AEP Ohio states that the conversion of existing AEP Ohio customers to third-party submetering involves processes that do not exist with greenfield sites and that the two types of conversions are not substantially similar. (AEP Ohio Reply Br. at 64; Tr. III at 446-447 - CONFIDENTIAL; AEP Ohio Ex. 3 at 19-20.)

{¶ 281} With respect to the second allegation of Count II, the Commission finds that NEP failed to establish a violation of R.C 4905.35. The arguments of NEP with respect to this alleged violation are like those argued in the second alleged violation in Count I of the counterclaims and, therefore, the conclusion of the Commission is also similar. As outlined above, it was not illogical for the Company to have concerns that converting the Apartment Complexes could result in violations of its own tariff. AEP Ohio limited the scope of the conversions it would resist until it gained clarity from the Commission via this Complaint.

{¶ 282} In the context of discrimination under R.C. 4905.35, AEP Ohio has been clear and consistent that it opposes all third-party submetering efforts. Based on this universal

opposition, AEP Ohio consistently states that it treated all third-party submetering companies in the same manner. A plethora of documents produced during discovery, as well as the testimony of witnesses, substantiate this assertion. As witness Williams testified, of the nine reacquisitions made by AEP Ohio's submetering initiative, only one building was managed by NEP, resulting in the reacquisition of 100 tenant customers. In contrast, at the time of hearing, AEP Ohio had managed to reacquire nine buildings managed by AP&L totaling 990 customers. Likewise, AEP Ohio internal documents show a general, equal focus on all third-party submetering companies, not singling out NEP or any other entity. There is no evidence offered by NEP that any of the actions described in this allegation were somehow made to specifically harm NEP, and thus a valid discrimination claim under R.C. 4905.35 has not been made. (AEP Ohio Ex. 3 at 16-17; NEP Exs. 44–49, 51-52, 55 - CONFIDENTIAL.)

c. Third Violation: AEP Ohio Allegedly Violated R.C. 4905.35 by Denying NEP Projects and Putting NEP's Customer's Projects on Hold, Subjecting NEP and Its Customers to Undue and Unreasonable Prejudice and Disadvantage

{¶ 283} NEP argues that AEP Ohio's approval of other customer requests to convert to master-meter commercial service but denial of the requests at the Apartment Complexes was unduly discriminatory and prejudicial to NEP and the affected property owners. According to NEP, AEP Ohio first delayed and later denied the requests at the same time that AEP Ohio was negotiating the conversion of the Champion Properties. NEP believes that the process of conversion should have been completed well before the September 2021 denial letter was issued, citing the testimony of witness Depinet in which he testified that in his experience at the Bantry Bay property, conversions are typically completed in less than six months. Further, the agreement that AEP Ohio required the owners of the Champion Properties to sign before it would approve their conversion requests expressly forbids the owners from enlisting NEP as a third-party contractor. NEP states that beyond its engagement at the Apartment Complexes, there is no substantive difference between the

requests for conversion at the Apartment Complexes and those at the Champion Properties. (NEP Initial Br. at 96-97; NEP Ex. 91 at 3; NEP Ex. 37; NEP Ex. 2 at ¶ 5.)

{¶ 284} AEP Ohio responds that in the arguments for this alleged violation, NEP recycles its comparisons between the Apartment Complexes and the Champion Properties, as well as a specious argument that the conversions at the Apartment Complexes should have been completed in a shorter amount of time. With respect to timing, AEP Ohio states that NEP never alleges or establishes what a reasonable completion time would have been. AEP Ohio also reiterates that NEP ignores key legal developments and factual distinctions that demonstrate both that the Apartment Complexes were unique, and that AEP Ohio did not act unreasonably. (AEP Ohio Reply Br. at 73.)

{¶ 285} AEP Ohio already addressed the Champion Properties arguments above, but it notes again here that they were not similarly situated to the Apartment Complexes (*See* Section III.B.d.iv above). As to any perceived delayed decision-making on the part of AEP Ohio, it stresses that the requests to convert the Apartment Complexes were unprecedented in size, scale, scope, and type, as well as in the timing of the requests – significantly for AEP Ohio, the requests were made nearly simultaneously with the *Wingo* decision. AEP Ohio again avers that *Wingo* changed "the legal landscape of third-party submetering." The *Wingo* decision forced AEP Ohio to reevaluate its position regarding third-party submetering during the same time that the requests to convert the Apartment Complexes were pending. AEP Ohio states that the dismissal of the *Wingo* remand by the Commission in July 2021 further complicated matters. (AEP Ohio Reply Br. at 73-74; AEP Ohio Ex. 3 at 18; NEP Ex. 89 at Ex. K - CONFIDENTIAL; Tr. II at 349-350, 377 - CONFIDENTIAL.)

{¶ 286} AEP Ohio suggests that given all the circumstances, it was not unreasonably discriminatory for it to refrain from converting the Apartment Complexes while it sought a determination from the Commission in the wake of the *Wingo* remand. Thus, AEP Ohio filed this Complaint. AEP Ohio states that it was not until the December 28, 2021 Stay Entry

that AEP Ohio was then definitively required to convert the Apartment Complexes, and AEP Ohio states that is what it did following that Entry. AEP Ohio states that as of the date of the hearing in late October 2022, it had completed four of the five conversions and that the fifth property was scheduled to convert on November 3, 2022. AEP Ohio argues that such effort can hardly be characterized as discriminatory treatment, especially considering the significant time and resources that go into master-meter conversions. AEP Ohio states that witness Depinet's estimates to the typical amount of time that conversions take is simply wrong. (AEP Ohio Reply Br. at 74-76; Tr. VI at 1160-1161; Tr. VII at 1214; NEP Ex. 91 at 3.)

{¶ 287} With respect to the third allegation of Count II, the Commission finds that NEP failed to establish a violation of R.C 4905.35. The Commission notes that this alleged violation, and the arguments made by NEP, largely mirror those in support of the third alleged violation of Count I. Likewise, the finding of the Commission on this third allegation is based on similar reasons as those outlined above with respect to the second violation of Count II. AEP Ohio frankly acknowledges that until the Commission issued a decision in the remanded *Wingo* case or otherwise provided guidance, it intended to treat conversion requests from all such companies the same. In the context of this proceeding, third-party submetering companies are the similarly situated entities. Additionally, all third-party submetering conversion requests and operations were to be analyzed under the three categories created by AEP Ohio. To sustain a claim of discrimination under R.C. 4905.35, NEP must establish that it was treated differently than similarly situated entities, which it fails to do. AEP Ohio opposed any and all conversion requests made by third-party submetering companies to convert buildings then serviced by AEP Ohio, such as those at the Apartment Complexes. NEP was not singled out or targeted by this policy. Further, even if these actions could be construed as discriminatory (which we do not believe them to be), discrimination is prohibited only without a reasonable basis. As reiterated throughout these conclusions, the Commission agrees with AEP Ohio that, given the circumstances, it was not unreasonable to take this action while it sought a determination from the

Commission in the wake of the *Wingo* remand. (*See* Section D.III.a.i above; *In the Matter of the Complaint of Cleveland Metro. Sch. Dist., Complainant*, No. 18-1815-EL-CSS, Opinion and Order (Apr. 20, 2022) at ¶ 100 (quoting *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 207 (1994).)

{¶ 288} In contrast, the conversion requests at the Champion Properties were made by the property owner, with the conversions and relationship between the parties to be governed by a settlement agreement. This is not the same as the conversion requests made at the Apartment Complexes (AEP Ohio Ex. 3 at Ex. JFW-2). The requests at the Apartment Complexes were made by NEP, a third-party submetering company, subject to a contract between NEP and the landlords as to submetering operations. As stated by AEP Ohio, the settlement agreement with the Champion Properties demonstrates that AEP Ohio distinguishes between property owners and third-party submetering companies, not among third-party submetering companies themselves. Further, even if one were to accept that the Champion Properties and the Apartment Complexes were similarly situated in the context and setting of this proceeding, the Commission agrees that AEP Ohio had a reasonable basis for distinguishing between types of conversion requests. (AEP Ex. 3 at Ex. JFW-2; *In the Matter of the Complaint of Cleveland Metro. Sch. Dist., Complainant*, No. 18-1815-EL-CSS, Opinion and Order (Apr. 20, 2022) at ¶ 100 (quoting *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 207 (1994).)

{¶ 289} NEP also claims that AEP Ohio intentionally delayed completing the conversion requests because of NEP's involvement, but the Commission is likewise unpersuaded. In support of this claim, NEP relies solely on the testimony of witness Depinet, in which he provides a comparison to how long it took to complete the conversion request at Bantry Bay in 2020 or other general statements concerning previous conversions he was involved with. (NEP Ex. 91 at 3; Tr. VI at 1173-1174.) AEP Ohio points out that the size and scope of the conversion at Bantry Bay is not comparable to that required at the Apartment Complexes. Bantry Bay involved approximately seven master-meter points and 50 residential customers. The Apartment Complexes, on the other hand, involved about 20

master-meter points and approximately 1,100 residential customers between all five buildings. Further, Mr. Depinet admitted that the Bantry Bay conversion took about one year to complete. (Tr. VI at 1176-1177; Tr. VII at 1190, 1216-1217; AEP Ohio Ex. 3 at 18.) Based on these differentiating factors, the two projects are not comparable. At the time of hearing, AEP Ohio had completed conversions at four of the five Apartment Complexes and was scheduled to have the final building converted within a month from that time. The Commission does not see evidence in the record to support a claim that AEP Ohio moved unreasonably slow in the conversions.

{¶ 290} For all of the foregoing reasons, the Commission finds that NEP failed to establish a valid discrimination claim under R.C. 4905.35 with respect to this third allegation.

d. Fourth Violation: AEP Ohio Allegedly Violated R.C. 4905.35 by Charging Customers Meter Removal Fees When Converting Multi-Family Properties to Master Meters but Not Charging Fees to Other Customers.

{¶ 291} This argument mirrors that made by NEP with respect to the fourth alleged violation of R.C. 4905.26 under Count I of the counterclaims (*See* Section IV.B.d.iii above). NEP states that AEP Ohio's unduly discriminatory and prejudicial actions extend to its application of meter removal fees, where such a disproportionate application of meter removal fees is without a reasonable basis. (NEP Initial Br. at 97; NEP Ex. 33 – CONFIDENTIAL; Tr. II at 401, 405 - CONFIDENTIAL.)

{¶ 292} AEP Ohio agrees that in this fourth alleged violation of Count II, NEP raises no new arguments from what was raised in the fourth alleged violation of Count I. AEP Ohio, thus, states that this claim should be denied for the same reasons outlined in that section – namely that that there is no evidence in the record as to whether a removal fee was ultimately charged at a particular location as claimed by NEP. AEP Ohio also asserts that this other location was not similarly situated to NEP and thus there can be no valid discrimination claim. Finally, even if NEP were able to prove discriminatory intent, AEP

Ohio counters that there was a reasonable basis for the conclusion reached by its staff concerning that other location. (AEP Ohio Reply Br. at 76; *see* Section III.D.iii.d above.)

{¶ 293} With respect to the fourth allegation of Count II, the Commission finds that NEP failed to establish a violation of R.C 4905.35. The Commission agrees with both parties that this allegation is virtually identical to that made for the fourth alleged violation of Count I. Thus, the Commission adopts here the same reasoning used to reject that claim. The record does not actually reflect whether a meter removal fee was or was not charged at the site highlighted by NEP. Thus, it is difficult to find any discriminatory actions by AEP Ohio when it has not been established precisely how it acted toward another entity. Further, based on the information filed under seal with the Commission, even if discrimination could be established, AEP Ohio provides a reasonable basis for actions discussed by its staff. (NEP Ex. 33 – CONFIDENTIAL.)

e. Fifth Violation: AEP Ohio Allegedly Violated R.C. 4905.35 by Bringing a Complaint Against NEP for the Purpose of Harming NEP and Putting It Out of Business.

{¶ 294} NEP asserts that AEP Ohio specifically targeted it with the purpose to put NEP out of business. NEP suggests that there are multiple different ways that AEP Ohio could have addressed the concerns raised in the Complaint. First, as suggested in the Supreme Court's *Wingo* decision, AEP Ohio could have sought resolution through the General Assembly, or AEP Ohio could have requested that the Commission reopen its investigation into submetering previously conducted in Case No. 15-1594-AU-COI, an option that NEP says AEP Ohio recognized in pleadings. Finally, because AEP Ohio was a party to the *Wingo* case, it could have opposed dismissal of the case after it was remanded to the Commission (it did not). NEP surmises that AEP Ohio chose none of these alternatives because it would not have attained AEP Ohio's "true goal" – direct harm to NEP and an immediate increase of revenue to AEP Ohio. Instead, NEP insists that AEP Ohio chose to file an "unlawful complaint." (NEP Initial Br. at 98-99.)

{¶ 295} Despite the existence of multiple submetering companies, AEP Ohio has not filed a complaint against any submetering company other than NEP. NEP feels that this is not a coincidence, because the elimination of the conversion requests at the Apartment Complexes would increase revenue and show the SWAT team/submetering initiative to have been successful. NEP argues that filing a complaint only against NEP to increase AEP Ohio revenue is discriminatory and prejudicial in violation of R.C. 4905.35. Further, NEP claims that to bolster the Complaint, AEP Ohio falsely reported to the Federal Energy Regulatory Commission that NEP was a top 20 customer of AEP Ohio and refuses to correct that false reporting. That too is unlawful and unreasonable according to NEP. (NEP Initial Br. at 99-100; Tr. II at 392-393 - CONFIDENTIAL.)

{¶ 296} AEP Ohio responds by accusing NEP of "Monday morning quarterbacking" AEP Ohio's approach to gaining clarity on third-party submetering in the post-*Wingo* world. Even if it is assumed that NEP's suggested alternative actions were tenable, that has no bearing on the propriety of filing this Complaint. AEP simply exercised its legal right to file a complaint case pursuant to R.C. 4905.26. NEP's assertion that AEP Ohio filed an "unlawful complaint" is disproven by the fact that the Commission already denied NEP's October 20, 2021 motion to dismiss on multiple bases, including a failure to state reasonable grounds for complaint. The Commission specifically noted that, in light of the *Wingo* decision in particular, AEP Ohio stated reasonable grounds for the Complaint to proceed to hearing. AEP Ohio finds it "utterly preposterous" that filing a good faith complaint, which the Commission accepted as being based on reasonable grounds, can constitute discriminatory treatment under R.C. 4905.35. Based on this reason alone, AEP Ohio argues that the Commission should find against NEP on this fifth alleged violation. (AEP Ohio Reply Br. at 76-78; Entry (Jan. 31, 2022) at ¶ 27.)

{¶ 297} AEP Ohio states that NEP manufactured a narrative that AEP Ohio concocted the Complaint simply to protect revenue erosion. While it is true that AEP Ohio analyzed revenue impacts with respect to submetering, witness Williams clarified that the primary purpose of the Complaint was to gain "clarity on AEP Ohio's certified territory and

its right to serve its existing customers," in the interests of ensuring customers are afforded adequate regulatory protections. Mr. Williams explained that the size of the "massive request" from NEP, which involved nearly 1,200 customers taking place on the heels of the *Wingo* decision, raised the concern that led the Company to bring the matter to the Commission. Thus, NEP's false narrative is inconsistent with the "true intent" behind AEP Ohio's actions, as testified to by the person responsible for AEP Ohio's submetering initiative. (AEP Ohio Reply Br. at 78-79; AEP Ohio Ex. 3 at 5; Tr. II at 197, 318 - CONFIDENTIAL; Tr. Vol. III at 586 – CONFIDENTIAL.) In addition, AEP Ohio adds that conducting revenue analyses is a prudent measure for any regulated company such as itself. As explained by witness Williams, "revenue is a consideration in anything we look at." Thus, considering the revenue impact of an action that AEP Ohio believes to be illegal activity is a reasonable course of action. (AEP Ohio Reply Br. at 79; Tr. III at 500.)

{¶ 298} Finally, AEP Ohio labels NEP's attempts to paint itself as the singular target of the Company's submetering initiative as "patently false." AEP Ohio points out that NEP itself admits that AEP Ohio had more success converting properties of third-party submetering companies other than NEP – thereby admitting that other third-party submetering companies were treated the same. AEP Ohio states that numerous internal documents show that it was analyzing the revenue impacts of many properties within its service territory that were submetered by other third-party companies. As AEP Ohio witness Williams explained, the company seeks to reacquire all residential tenants that have been moved to third-party submetering service, not just those served by NEP. AEP Ohio avers that the record does not fit NEP's narrative that it was targeted or treated differently than other third-party submetering companies. Further, AEP Ohio reiterates that its treatment of NEP was reasonable under the circumstances and, therefore, this fifth violation also fails. (AEP Ohio Reply Br. at 79-80; *see* NEP Exs. 52 and 55 - CONFIDENTIAL; AEP Ohio Ex. 3 at 16.)

{¶ 299} With respect to the fifth allegation of Count II, the Commission finds that NEP failed to establish a violation of R.C 4905.35. NEP is correct that there were multiple

avenues that AEP Ohio could have selected to gain clarity on the third-party submetering issues raised in the Complaint. The fact that AEP Ohio chose the viable, lawful option of filing a complaint – the singular option that NEP dislikes – is not evidence of discrimination. NEP's accusation of AEP Ohio filing an "unlawful complaint" has already been refuted by the dismissal of NEP's motion to dismiss. In that Entry, the attorney examiners properly determined that, in light of the *Wingo* decision, AEP Ohio had stated reasonable grounds under R.C. 4905.26 for the Complaint to proceed to hearing. (Entry (Jan. 31, 2022) at ¶ 27.) The Commission agrees that the filing of a good faith complaint, stating reasonable grounds, cannot be seen as discriminatory. While NEP may be correct that this is the only complaint filed by AEP Ohio against a third-party submetering company, the intent of the Complaint is to gain clarity from the Commission following *Wingo*, which should then negate the need for future complaints to be filed, either by public utilities or landlords/submetering companies.

{¶ 300} NEP also undercuts its own depiction of itself as the sole target of AEP Ohio's efforts to recover submetered customers. NEP states that the SWAT team struggled to convert properties managed by NEP but had at least some success in reacquiring properties managed by other third-party submetering companies (NEP Ex. 75 - CONFIDENTIAL). This admission alone refutes NEP's claim to be the lone focus of AEP Ohio's efforts, and lends credence to AEP Ohio's stated goal, as testified to by witness Williams, of attempting to recover all residential tenants with third-party submetering service, not exclusively those of NEP (AEP Ohio Ex. 3 at 16). Further, there is a plethora of internal AEP Ohio documentation that shows the Company's efforts to reacquiring service to tenants managed by any third-party submetering company, not solely those of NEP (NEP Exs. 44-49, 51-52, 55 - CONFIDENTIAL).

{¶ 301} Finally, having already determined that neither AEP Ohio's filing of this lawful Complaint nor its submetering initiative evidence discriminatory action on the part of the Company, NEP's assertions concerning revenue erosion being the driving factor behind AEP Ohio's actions are at this point trivial. It is not surprising that a for-profit

company such as AEP Ohio would analyze revenue impacts after receiving requests such as those made to convert the five Apartment Complexes. Further, AEP Ohio does not dispute that it analyzed revenue impacts as part of its submetering initiative, but notes that revenue is a consideration in virtually everything the Company does (Tr. III at 500). AEP Ohio's interest in retaining or acquiring revenue is obvious, but to claim that was the sole intent behind the filing of the Complaint is not supported by the record.

5. COMMISSION CONCLUSION ON COUNTERCLAIMS

{¶ 302} In conclusion, the Commission finds that NEP failed to meet its evidentiary burden in its claims that AEP Ohio violated either R.C. 4905.26 or R.C. 4905.35(A), except to the second alleged violation of Count I of its counterclaims, where we find in favor of NEP on a limited basis. We reiterate that, in the event AEP Ohio suspects any third-party submetering company of encroaching on the statutory line of operating as a public utility, AEP Ohio will have the same appropriate recourse it took in this proceeding, filing a complaint with the Commission.

V. PROCEDURAL ISSUES

{¶ 303} NEP recounts that on October 19, 2022, the attorney examiner issued an omnibus decision on several discovery-related motions, but states that neither those motions, nor the resulting October 19, 2022 Entry, were related to introduction of evidence at the evidentiary hearing that started on October 24, 2022. At the evidentiary hearing, the attorney examiner denied the introduction of evidence or testimony on: (1) the Northtowne apartment complex owners' requests to convert to master-meters that AEP Ohio identified as a basis to urge a ruling on its interlocutory appeal in its May 27, 2022 letter filed in this case; and (2) legislative efforts by AEP Ohio and others regarding submetering. NEP maintains that both subjects are relevant to NEP's defenses and counterclaims and, thus, NEP should have had the opportunity to introduce relevant testimony and exhibits on those topics into the record. (NEP Initial Br. at 101; Tr. III at 503-509, 510-514.)

{¶ 304} NEP asserts that its counterclaims against AEP Ohio center upon AEP Ohio's disparate treatment of NEP compared to other entities. NEP, therefore, believes that all disparate treatment between NEP and those similarly situated should be considered and are relevant to NEP's counterclaims and defenses. NEP states that the refusal to convert the Apartment Complexes and the filing of this Complaint in September 2021 did not end the discrimination against customers contracting with NEP. NEP recounts that in approximately May 2022, a request for conversion of the Northtowne apartments was submitted to AEP Ohio, to which AEP Ohio responded that such a request would result in AEP Ohio having to abandon service at the location. AEP Ohio then, in response, filed an abandonment action for the Northtowne property. (NEP Initial Br. at 102; NEP Ex. 91 at 15, Ex. G.) NEP submits that the filing of the abandonment application for the Northtowne property was a first of its kind related to submetering and is an example of the retaliatory intent by AEP Ohio against NEP. NEP believes that it should have been permitted to fully question AEP Ohio witnesses on this topic and that Ms. Ringenbach should have been allowed to testify about AEP Ohio's actions concerning Northtowne. NEP argues that the Northtowne apartment conversion request was made a part of this case by virtue of AEP Ohio identifying this request as a basis for needing an expedient ruling on AEP Ohio's interlocutory appeal of the December 28, 2021 Stay Entry. (NEP Initial Br. at 103; NEP Ex. 91 at 15.)

{¶ 305} NEP submits that it also should have been permitted to introduce documents and evidence on the various legislative proposals regarding submetering that both NEP and AEP Ohio have considered, and that have been introduced in the legislature and opposed by AEP Ohio, over the years, including proposals that would have given the Commission direct authority to regulate submetering. NEP reiterates that AEP Ohio could have sought resolution of its concerns about submetering in the General Assembly rather than filing this Complaint. NEP believes that it should have had the opportunity to include in the record both NEP and AEP Ohio testimony regarding the legislative options available to support NEP's counterclaims and defense. NEP avers that AEP Ohio's decision to file a

complaint itself, rather than pursing a legislative resolution, is additional evidence of AEP Ohio's disparate treatment of NEP. NEP submits that if AEP Ohio was pursuing legislative solutions at the same time it filed its Complaint against NEP then another fact exists showing that AEP Ohio's filing of the Complaint against NEP was unduly discriminatory and prejudicial. (NEP Initial Br. at 104.)

{¶ 306} In short, NEP argues that if AEP Ohio believes that NEP is a public utility under current law, then there would be no need to go to the legislature to regulate submetering. Thus, NEP should have been permitted to cross-examine AEP Ohio's witnesses on that topic as well as introduce evidence in this hearing to further support NEP's counterclaims and defenses. The Commission should therefore have been able to consider such efforts by the parties including Ms. Ringenbach's testimony that was stricken on that topic. (NEP Initial Br. at 105; NEP Ex. 90 at 36-37; Tr. VI at 1031-1032.)

{¶ 307} AEP Ohio responds that the attorney examiners properly denied NEP's motion to compel on these two topics and correctly ruled at hearing when they struck portions of witness testimony on these issues and sustained objections as to cross-examination on these topics (AEP Ohio Reply Br. at 81; Tr. III at 508, 514; Tr. VI at 1032). To the extent that NEP argues that the October 19, 2022 Entry dealt only with discovery and not hearing evidence, AEP Ohio points out that Ohio Adm.Code 4901-1-27 gives attorney examiners the authority to regulate the course of the hearing, including taking such actions as are necessary to, among other things, avoid unnecessary delay and to prevent the presentation of irrelevant evidence and/or cross-examination. (AEP Ohio Reply Br. at 80, 82-83.)

{¶ 308} With respect to Northtowne, AEP Ohio reiterates that Northtowne is not one of the five Apartment Complexes that are the subject of this proceeding. Further, AEP Ohio did not file its abandonment application of the Northtowne Property (in Case No. 22-693-EL-ABN) until July 2022, months after NEP filed its counterclaims – thus, the Northtowne abandonment application cannot be the basis for the counterclaims. AEP Ohio

submits that NEP raises no new arguments on this issue in its post-hearing brief that were not already raised, and dealt with, in the previous ruling on the motion to compel and in the attorney examiners' rulings at the evidentiary hearing in this case. (AEP Ohio Reply Br. at 84-85.)

{¶ 309} AEP Ohio states that NEP is largely recycling its previous arguments relating to the relevance of AEP Ohio's prior legislative proposals. AEP Ohio does acknowledge, however, that NEP does include a few new arguments on this matter, such as: (i) AEP Ohio's decision to file a complaint, while opposing a legislative solution for submetering jurisdiction, is further evidence of disparate treatment of NEP; and (ii) AEP Ohio filing the Complaint while at the same time pursuing legislative solutions shows that the Complaint was discriminatory and prejudicial. AEP Ohio responds to these assertions by highlighting that neither counts of NEP's counterclaims are based on AEP Ohio's decision to file a complaint rather than seek a legislative solution – the counterclaim dealing with discriminatory treatment is based on AEP Ohio's refusal to convert the Apartment Complexes to master-meter service. Additionally, AEP Ohio points out the paradox of NEP's position, which would require a determination that the filing of a valid complaint under R.C. 4905.26 somehow violates R.C. 4905.26 and R.C. 4905.35. (AEP Ohio Reply Br. at 83-84.)

{¶ 310} More specific to the issue of legislative proposals made or considered by AEP Ohio, the Company disagrees with NEP's assertion that such proposals somehow contradict filing a complaint in this case. AEP Ohio avers that legislation is used not only to modify or create new laws, but also to clarify existing law. Thus, even if AEP Ohio went to the General Assembly for clarification of the Commission's jurisdiction over submetering, that would not prove that the Commission lacks jurisdiction under the current statute. AEP Ohio states that it simply exercised its right to petition the legislature and the legislative positions it took, and the communications sent regarding such positions are not probative or relevant to the central issue in this case. Finally, AEP Ohio notes that requiring disclosure

of legislative material in this fashion could create a chilling effect on entities' exercise of free speech rights. (AEP Ohio Reply Br. at 84-85.)

{¶ 311} Having reviewed the rulings made by the attorney examiners at the hearing to deny the introduction of testimony or exhibits on either the Northtowne apartment complex or AEP Ohio legislative efforts, as well as the arguments made by both parties in post-hearing briefs, the Commission affirms the attorney examiners' rulings. The rulings made at hearing on these issues are aligned with those rendered in the October 19, 2022 Entry in which the attorney examiners denied NEP's motion to compel AEP Ohio to respond to discovery requests on these topics. In that Entry, addressing the Northtowne issue, the attorney examiners agreed with AEP Ohio's argument concerning the timeline of events, as the request for conversion of Northtowne and the subsequent abandonment filing occurred months after NEP filed its counterclaims. Thus, actions concerning the Northtowne abandonment application could not be the basis of any counterclaims. Further, the Northtowne complex is already the subject of a separate Commission proceeding, in which NEP is free to delve into the facts and circumstances around that conversion request and proposed abandonment, rather than swelling the already bloated docket and record in this case. The attorney examiners also were unpersuaded that AEP Ohio referencing the Northtowne conversion request in its May 2022 letter somehow makes it appropriate to include Northtowne into this case. The attorney examiners ruled that the context in which Northtowne was referenced in that letter was merely as an example of AEP Ohio needing further clarification as to the extent of the stay that was previously granted (and ultimately modified by order of this Commission when addressing AEP Ohio's interlocutory appeal of the Stay Entry). (Entry (October 19, 2022) at ¶ 40.)

{¶ 312} With respect to legislative proposals, the attorney examiners rightly noted that the central issue in the case is what the law is now, interpreted in light of the *Wingo* decision, to determine whether NEP is operating as a public utility. Further, the attorney examiners found that delving into draft legislation and hypothetical proposals would serve

to do nothing more than unnecessarily expand the scope of the proceeding and enlarge an already complex case record. (Entry (October 19, 2022) at ¶ 48.)

{¶ 313} While NEP rightly points out that this Entry dealt with discovery issues and not the introduction of evidence, the Commission believes that the same reasoning applies to the rulings made by the attorney examiners during the hearing. The attorney examiners made clear in each of their rulings that the same rationale outlined in the October 19, 2022 Entry formed the reasoning for the rulings to preclude evidence or questioning on these topics during the hearing (Tr. III at 508; Tr. VI at 1032-1033). Ohio Adm.Code 4901-1-27 gives attorney examiners wide authority to regulate the course of a hearing and the attorney examiners sensibly exercised that authority in this proceeding. An examination of the docket and hearing transcript in this case validates the attorney examiners' position that the addition of tangential issues to an exceedingly contentious, lengthy proceeding would only serve to distract from the main issue in the case – whether NEP would be operating as a public utility at the Apartment Complexes under the current law. The Commission finds no new arguments from NEP to alter the determinations made by the attorney examiners in either the October 19, 2022 Entry or the oral rulings made during the evidentiary hearing. We therefore affirm the rulings made by the attorney examiners at the evidentiary hearing to preclude testimony and cross-examination related to the Northtowne property and legislative proposals that may have been made by AEP Ohio.

{¶ 314} The Commission notes that any evidence and/or argument not specifically addressed herein, whether in regard to the Complaint or the counterclaims, has nevertheless been considered and weighed by the Commission in reaching its final determination.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 315} On September 24, 2021, AEP Ohio filed the Complaint against NEP, arguing that NEP is operating at the Apartment Complexes as a public utility under R.C. 4905.02, is in violation of R.C. 4933.83(A), and in violation of R.C. 4928.08(A).

{¶ 316} AEP Ohio is a public utility as defined by R.C. 4905.02, and an electric light company, as defined by R.C. 4905.03(A)(3), and, as such, is subject to the jurisdiction of the Commission.

{¶ 317} On October 18, 2021, NEP filed its answer to the Complaint, denying the material allegations contained in the Complaint.

{¶ 318} On January 11, 2022, NEP filed a motion for leave to file an amended answer and counterclaim, instanter, which was granted in an Entry issued on January 31, 2022.

{¶ 319} On April 22, 2022, as amended on May 2, 2022, AEP Ohio filed its answer to NEP's counterclaims.

{¶ 320} An evidentiary hearing was held beginning October 24, 2022, and ending on November 8, 2022.

{¶ 321} The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 322} The Commission finds that Complainant failed to meet its burden of proving that NEP is "engaged in the business of supplying electricity," is an "electric light company" under R.C. 4905.03(C), or a "public utility" under R.C. 4905.02(A).

{¶ 323} The Commission finds that Complainant failed to meet its burden of proving that NEP is operating as an "electric supplier" within AEP Ohio's certified territory in violation of R.C. 4933.83(A).

{¶ 324} The Commission finds that Complainant failed to meet its burden of proving that NEP is supplying or arranging for the supply of a competitive retail electric service without the required certification in violation of R.C. 4928.08(B).

{¶ 325} The Commission finds that NEP failed to meet its evidentiary burden in its claims that AEP Ohio violated R.C. 4905.26, except to the second alleged violation of Count I of its counterclaims, where we find in favor of NEP on a limited basis.

{¶ 326} The Commission finds that NEP failed to meet its burden of proving that AEP Ohio violated R.C. 4905.35(A).

VII. ORDER

{¶ 327} ORDERED, That AEP Ohio file within 90 days a new electric resale tariff, consistent with this Order. It is, further,

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

COMMISSIONERS:
Approving:
Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

MJS/DMH

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF OHIO POWER COMPANY,

COMPLAINANT,

v.

CASE NO. 21-990-EL-CSS

NATIONWIDE ENERGY PARTNERS, LLC,

RESPONDENT.

SEPARATE OPINION OF COMMISSIONER CONWAY

Entered in the Journal on September 6, 2023

{¶ 1} I join today's Opinion and Order. I am writing separately in order to provide additional context and reasoning regarding my support for that decision. Today's order applies the statutory language of R.C. 4905.03(C)'s definition of an "electric light company" directly and through application of the original *Shroyer* test to the submetering business model Nationwide Energy Partners (NEP) is using in concert with the landlords at the five Apartment Complexes. As the order explains in detail, the Apartment Complexes' landlords obtain master-meter service from AEP Ohio, and they contract with NEP to arrange for the submetering, redistribution, and resale of electricity to the landlords' tenants.

{¶ 2} Our application of the statutory language for R.C. 4905.03(C) (and the original *Shroyer* test) is guided and constrained by the Ohio Supreme Court's (Court) decision in *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617 (2020) (*Wingo*). It is also guided by the Court's decisions addressing landlord-tenant submetering, redistribution, and resale practices issued periodically over nearly one-hundred years (in *Jonas v. Swetland,* 119 Ohio St. 12, 162 N.E. 45, (1928); *Shopping Cent'rs Ass'n v. Public Util. Comm.*, 3 Ohio St. 2d 1, 1-5, 208 N.E. 2d 923 (1965); *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d

485, (2002); and *Pledger v. Pub. Util. Comm*., 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, (2006). Throughout that lengthy period the statutory definition of an entity that is an "electric light company" under R.C. 4905.03(C) (and any of its antecedent code provisions) which is a public utility subject to our jurisdiction has remained, in relevant part, the same, as NEP has pointed out.

{¶ 3} However, until the *Wingo* litigation, it is also true that none of the fact patterns that underlaid any of the precedents in this category of cases that reached the Court – or us (*e.g.*, *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Case No. 90-182-WS-CSS et al., Opinion and Order (Feb. 27, 1992); and *In re Complaint of Michael E. Brooks, et al. v. The Toledo Edison Co.*, Case No. 94-1987-EL-CSS (*Brooks*), Opinion and Order (May 8, 1996)– remotely resembled the highly sophisticated and large-scale third-party model that NEP has deployed in Ohio through its contracts with the Apartment Complexes' landlords. So, it is incumbent upon us, in my view, when applying the statutory language to the facts of this case to take that into account.

{¶ 4} I agree that the approach that our order takes to applying the statutory language directly (and, also, when applying the original *Shroyer* test) to the novel and unprecedented fact pattern that we face in this case is an appropriate one. I also agree that it is appropriate to exercise our "authority to set reasonable terms and conditions on jurisdictional utilities providing master-meter service so as to ensure that users of that service, such as landlords, are providing it to the ultimate end user [*i.e.*, tenants] in a manner which is safe and consistent with the public interest." *Brooks, supra*, at 16, footnote 12.

{¶ 5} In addition, I am of the view that there is an alternative approach to applying the statutory language to the facts that achieves substantially the same result, as a practical matter. Turning first to the language of R.C. 4905.03(C), which the Court in *Wingo* directs us to do, it states, in relevant part, that an entity is:

> "An electric light company, when [1] engaged in the business [2] of supplying electricity for light, heat, or power purposes [3] to

> consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state ****"

{¶ 6} The question, in my view, is at what point does the landlord's submetering activities (whether conducted with in-house employees or by contracting with a third-party supplier like NEP), rise to a level where the landlord (or the landlord in combination with the third-party supplier like NEP) can fairly be characterized as being "engaged in the business" of supplying electricity to the tenants? At that point, in my opinion, the landlord also is no longer the only "consumer" in the master-meter/submetering arrangement; the tenant becomes a "consumer" also; and the landlord is "supplying' the consumer/tenant with electricity for "light, heat, or power purposes." So, when does the landlord cross that line? As a practical matter, I think it occurs when the landlord (with or without the third-party supplier like NEP) treats the provision of electricity to its tenants as a separate profit center and line of business. At that point, the business model stops being an adjunct, or ancillary, activity in support of renting apartment units to the tenants.

{¶ 7} At what point, precisely, does the landlord's submetering activity cross that line, where the landlord is treating submetering as a separate profit center or line of business? One reasonable line of demarcation, I believe, might be gleaned from the Court's decision in *Pledger*. In that case the landlord billed individual tenants for water and sewer services based on the amount of water use at each apartment unit, multiplied by the rate charged by the ultimate providers of the water and sewer services plus ten percent as an administrative fee. *Pledger* at ¶¶ 2-3. Notably, the Court in *Pledger*, in the course of affirming the Commission's decision that was the subject of that appeal, also reviewed and approved the Commission's use of the original *Shroyer* test. In the course of affirming the use of the original *Shroyer* test, the *Pledger* court stated that the underlying facts of *Shroyer*, in which the landlord paid a commercial rate to the water utility involved and charged its tenants the utility's residential service rate, were similar to those underlying *Pledger*. *Pledger* ¶¶ 19-21. I think it would be reasonable to set the line of demarcation, therefore, at the point where

the landlord charges tenants in excess of the residential rate of the utility that is providing master-meter service to the landlord. If charges to tenants are in excess of that level, it would be reasonable to conclude that the landlord (or the landlord in concert with NEP) "is engaged in the business of supplying electricity for light, heat, or power purposes" and its tenants have become "consumers" of electricity under R.C.4905.03(C).

{¶ 8} With regard to our application of the original *Shroyer* test to the novel and unprecedented facts of this case, I would conclude as follows. The scale of the Apartment Complexes fact pattern, where there are in excess of 100 tenants involved in the smallest complex and nearly 400 tenants at the largest, is so large that the first *Shroyer* question is essentially irrelevant. Each of the complexes on its own, from the standpoint of the number of tenant consumers, and certainly if they are considered in the aggregate, I am sure is larger than many public utilities that we regulate as such. Whether NEP or its landlord partners have accepted the grant of a franchise territory, the use of eminent domain authority, or the use of public rights of way is entirely irrelevant to the model that they use because the landlords effectively give NEP (and themselves) the equivalent of all of those special benefits throughout the Apartment Complex properties.

{¶ 9} With regard to the second *Shroyer* question, again the scale of the submetering activity is so large that it renders the point of the question without much meaning. The NEP model provides it and the landlord with a monopoly over sizable pools of customers. Why would they have any interest in extending their service areas beyond the boundaries of the complex(es)?

{¶ 10} With regard to the third *Shroyer* question, I have already answered it affirmatively above through the statutory analysis. In the event that the landlords (in concert with NEP) are charging rates to the end user tenants that exceed AEP Ohio's residential standard service offer rates, I would conclude that they are "engaging in the business of supplying electricity for the purposes of light, heat, or power to consumers." Accordingly, in that scenario, their submetering activities would not be ancillary to their

primary business; and that would be sufficient to determine that they are a public utility under the original *Shroyer* test.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Daniel R. Conway

By: Daniel R. Conway
Commissioner

Summary: Opinion & Order The Commission finds that Ohio Power Company failed to carry its burden of proving that Nationwide Energy Partners, LLC is (i) engaged in the business of supplying electricity, is an “electric light company” under R.C. 4905.03(C), or a “public utility” under R.C. 4905.02(A); (ii) operating as an “electric supplier” within Ohio Power Company’s certified territory in violation of R.C. 4933.83(A); and (iii) violating R.C. 4928.08(B) by supplying or arranging for the supply of a competitive retail electric service without the required certification. With respect to counterclaims filed by the respondent, the Commission finds that Nationwide Energy Partners, LLC failed to carry its burden of proving that Ohio Power Company’s actions discussed herein (i) violated R.C. 4905.26, except to the second alleged violation of Count I of its counterclaims where we find in favor of NEP on a limited basis, and (ii) violated R.C. 4905.35(A). Additionally, as discussed herein, the Commission directs AEP Ohio to file an application to modify its electric service resale tariff to include certain provisions related to landlords engaging in the resale of electricity to tenants. Concurring Opinion of Commissioner Daniel Conway electronically filed by Ms. Donielle M. Hunter on behalf of Public Utilities Commission of Ohio.

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF OHIO POWER COMPANY,

COMPLAINANT,

v.

CASE NO. 21-990-EL-CSS

NATIONWIDE ENERGY PARTNERS, LLC,

RESPONDENT.

SECOND ENTRY ON REHEARING

Entered in the Journal on December 13, 2023

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Ohio Power Company on October 6, 2023.

II. RELEVANT PROCEDURAL HISTORY

{¶ 2} On September 24, 2021, the Ohio Power Company (AEP Ohio) filed a complaint against Nationwide Energy Partners, LLC (NEP). As background, AEP Ohio is a "public utility" under R.C. 4905.02, an "electric light company" under R.C. 4905.03 and 4928.01, and an "electric utility" and "electric distribution utility" as those terms are defined in R.C. 4928.01. AEP Ohio explained that it has been granted a service territory under the Certified Territories Act, within which AEP Ohio has the exclusive right to provide electric distribution service and other noncompetitive electric services. *See* R.C. 4933.83(A). In the complaint, AEP Ohio stated that NEP is an entity engaged in the practice of submetering, whereby NEP, acting as the agent of a landlord or building owner engages in the resale or redistribution of public utility services where the owner of an apartment building or multi-residential complex divides up a master bill to individual tenants so that each tenant pays for their share of utilities used. AEP Ohio explained that the complaint arose from a request

from NEP, acting as the agent of five apartment complex owners (Apartment Complexes), that AEP Ohio establish master-metered service at the Apartment Complexes, which AEP Ohio asserted would amount to NEP taking over electric distribution service to the tenants in the Apartment Complexes. AEP Ohio alleged that NEP intends to purchase electric service from AEP Ohio at wholesale-like master-metered rates and then resell electric service to the individual Apartment Complex tenants at a considerable markup. In the complaint, AEP Ohio alleged that allowing NEP to begin submetering at the Apartment Complexes would violate numerous statutes and Commission regulations, including the Certified Territories Act, as NEP would be operating as a public utility. AEP Ohio asserted that while NEP has operated in this capacity for many years, the question of whether third-party submetering companies such as NEP are public utilities is now unsettled following the Supreme Court of Ohio's decision in *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617 (*Wingo*).

{¶ 3} On October 18, 2021, NEP filed its answer to the complaint. NEP admitted that AEP Ohio is a public utility subject to the Commission's jurisdiction and that AEP Ohio has been granted an exclusive territory to provide electric distribution service under the Certified Territories Act. NEP further admitted that it provides certain management services to property owners, managers, and developers pursuant to private contractual agreements. NEP conceded that pursuant to its contractual obligations and as the authorized representative of each property owner, manager, and developer, NEP receives and pays invoices from AEP Ohio's master-metered utility charges on behalf of the respective property owner, manager, and developer. NEP denied, however, that it would be "taking over" service from AEP Ohio if the requested master-metered service were set up at the Apartment Complexes. NEP further denied that it is a public utility under R.C. 4905.02 and, therefore, NEP asserted that it is not subject to the Commission's statutes and rules governing public utilities. NEP's answer also asserted a number of affirmative defenses.

{¶ 4} On October 28, 2021, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene and accompanying memorandum in support. NEP filed a memorandum contra this motion to intervene on November 12, 2021; OCC filed a reply in support on November 19, 2021. As part of a January 31, 2022 Entry, the attorney examiner denied OCC's motion to intervene.

{¶ 5} By Entry issued December 28, 2021 (the Stay Entry), the attorney examiner granted NEP's December 10, 2021 motion for a stay. As outlined in the Stay Entry, the attorney examiner found that NEP satisfied the four-factor test adopted by the Commission to determine whether a stay should be granted in a Commission proceeding. The Stay Entry stated that application of the Supreme Court's guidance and its ultimate effect upon submetering companies, public utilities, and Commission-approved tariffs is a determination that can be made only by the Commission. As no such analysis and determination has yet been made by the Commission, the attorney examiner agreed with NEP that it is inappropriate for AEP Ohio to unilaterally alter the interpretation and implementation of its Commission-approved tariffs relating to master-metered service.

{¶ 6} On January 3, 2022, AEP Ohio filed an interlocutory appeal (or, in the alternative, request for certification of interlocutory appeal) of the ruling in the Stay Entry which granted NEP's request for a stay. AEP Ohio asserted that the Stay Entry exceeded the attorney examiner's authority and, therefore, the Commission should consider its interlocutory appeal as of right. Alternatively, AEP Ohio argued that the interlocutory appeal should be certified to the Commission because it raises important and novel questions of law concerning the Commission's authority to grant preliminary relief. As to the actual appeal, AEP Ohio argued that the Commission should reverse the ruling for five primary reasons outlined therein.

{¶ 7} On January 11, 2022, NEP filed a motion for leave to file an amended answer and counterclaim, instanter. On January 26, 2022, AEP Ohio filed a memorandum contra NEP's motion. On February 2, 2022, NEP filed a reply in support of its motion.

{¶ 8} On February 7, 2022, OCC filed an interlocutory appeal of the attorney examiner's January 31, 2022 ruling that denied OCC intervention in this proceeding. Because OCC's interlocutory appeal sought reversal of a decision to deny OCC intervention in the case, its interlocutory appeal came before the Commission as an appeal of right pursuant to Ohio Adm.Code 4901-1-15(A)(2).

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

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

{¶ 11} By Entry issued July 27, 2022, this Commission denied AEP Ohio's interlocutory appeal of the Stay Entry and affirmed the attorney examiner's denial of OCC's intervention in this proceeding.

{¶ 12} On August 26, 2022, OCC filed an application for rehearing of the Commission's denial of its interlocutory appeal. This application for rehearing was denied by operation of law pursuant to R.C. 4903.10.

{¶ 13} The evidentiary hearing commenced on October 24, 2022, at the offices of the Commission, with the first phase of the hearing continuing through November 1, 2022. On November 4, 2022, the hearing recommenced via Webex to take a witness' testimony. Then on November 8, 2022, the hearing recommenced via Webex to close the record and set a briefing schedule.

{¶ 14} In its September 6, 2023 Opinion and Order (Opinion and Order), the Commission found that AEP Ohio failed to carry its burden of proving that NEP is (i) engaged in the business of supplying electricity, is an "electric light company" under R.C.

4905.03(C), or a "public utility" under R.C. 4905.02(A); (ii) operating as an "electric supplier" within Ohio Power Company's certified territory in violation of R.C. 4933.83(A); and (iii) violating R.C. 4928.08(B) by supplying or arranging for the supply of a competitive retail electric service without the required certification. With respect to counterclaims filed by NEP, the Commission found that NEP failed to carry its burden of proving that AEP Ohio's actions (i) violated R.C. 4905.26, except to the second alleged violation of Count I of its counterclaims where the Commission found in favor of NEP on a limited basis, and (ii) violated R.C. 4905.35(A). Additionally, the Commission directed AEP Ohio to file an application to modify its electric service resale tariff to include certain provisions related to landlords engaging in the resale of electricity to tenants.

{¶ 15} Pursuant to R.C. 4903.10, any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the Commission's order is journalized.

{¶ 16} On October 6, 2023, AEP Ohio filed an application for rehearing (Application for Rehearing), asserting that the Opinion and Order was unlawful and unreasonable based upon four grounds for rehearing outlined therein. NEP filed a memorandum contra AEP Ohio's Application for Rehearing on October 16, 2023.

{¶ 17} Also on October 6, 2023, OCC filed a motion for leave to file instanter an application for rehearing as well as an application for rehearing. NEP filed a memorandum contra OCC's application for rehearing on October 16, 2023.[1]

{¶ 18} By Entry issued November 1, 2023, the Commission granted AEP Ohio's Application for Rehearing for the limited purpose of affording the Commission more time to consider the issues raised therein.

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[1] OCC's motion for leave to file is now considered moot, as any application for rehearing it filed would have been denied by operation of law pursuant to R.C. 4903.10.

III. DISCUSSION

{¶ 19} In the Application for Rehearing, AEP Ohio reiterates its position regarding submetering and its general posture in this proceeding – that the *Wingo* remand left a gap in the law such that it was unclear what constituted "unlawful" resale of electricity under AEP Ohio's resale tariff. AEP Ohio believes that the Commission ignored the Supreme Court's reference to the "big business" form of submetering by third-party companies such as NEP. AEP Ohio submits that the Opinion and Order was unlawful and unreasonable in four respects. First, AEP Ohio argues that the Commission erred by misinterpreting R.C. 4905.26 as a source of substantive rights, as opposed to a procedural statute, and finding that AEP Ohio violated R.C. 4905.26 "on a narrow and limited basis…to the extent it applies to NEP." Second, AEP Ohio submits that the Commission erred by *sua sponte* ordering AEP Ohio to establish a new "reseller tariff." Third, AEP Ohio argues that the Commission should have applied the "plain language" of R.C. 4905.03(C) and concluded that NEP is engaged in the business of supplying electricity and is, therefore, an "electric light company" and "public utility" under Ohio law. Finally, AEP Ohio believes that it was unlawful for the Commission to direct AEP Ohio to convert the Apartment Complexes to master-metered service without first determining whether such conversions would be "reasonable" under R.C. 4905.20 and 4905.21 (the Miller Act) and, thus, the Opinion and Order violates the Miller Act.

{¶ 20} In its memorandum contra, NEP submits that the Commission should deny the Application for Rehearing, as it raises no specific grounds upon which it considers the Opinion and Order to be unreasonable or unlawful. Rather, NEP argues that AEP Ohio, in essence, simply disagrees with the Commission's decision and reprises arguments previously raised at the hearing and in briefs. NEP states that none of AEP Ohio's four grounds for rehearing are sufficient to grant the application.

{¶ 21} The Commission will address each of AEP's grounds for rehearing, as well as NEP's response, below. Any claim or argument raised in the Application for Rehearing

that is not specifically discussed herein was nevertheless thoroughly and adequately considered by the Commission and is denied. As was the case in the Opinion and Order, any evidence and/or argument raised in the Application for Rehearing that is not specifically addressed herein has nevertheless been fully considered and weighed by the Commission and is hereby denied.

A. First Ground for Rehearing: The Commission's "Narrow and Limited" Ruling in Favor of NEP on Part 2 of NEP's Count I is an Unreasonable and Unlawful Application of the Complaint Case Statute, R.C. 4905.26.

{¶ 22} AEP Ohio first argues that because NEP did not devote substantial portions of its post-hearing briefs to this part of its counterclaims, this allegation was "not a focus" of NEP's case and it was, therefore, unreasonable, unlawful, and against the manifest weight of the evidence for the Commission to have made this ruling (App. for Rehearing at 16-17). However, the Commission based its ruling on the evidence in the record of this case, rather than the degree to which the parties addressed the issue on brief, and there is no dispute in the record of this case that AEP Ohio had modified its previous practice to deny property owner requests to convert existing buildings to master-metered service unless the property owner agreed to not contract with a third-party submetering company.

{¶ 23} AEP Ohio reiterates an argument that it only first raised in its post-hearing reply brief – that R.C. 4905.26 is a jurisdictional and procedural mechanism, not an independent standard that an entity can "violate." In support of this position, AEP Ohio again points to an attorney examiner entry in Case No. 05-1011-EL-CSS, et al. (*Allianz*), in which an attorney examiner stated that R.C. 4905.26 "does not establish any particular duty to serve."[2] AEP Ohio also points to a Commission entry issued in Case No. 77-862-GE-CSS (*Ihlendorf*), in which the Commission referred to R.C. 4905.26 as the procedural vehicle for bringing complaints before the Commission, as well as a 1975 Ohio Supreme Court decision

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[2] *In Re Allianz US Global Risk Ins. Co. v. FirstEnergy Corp.*, Case No. 05-1011- EL-CSS, et al., Entry at ¶ 34 (Aug. 7, 2006).

on the topic.[3] AEP Ohio stresses that R.C. 4905.26 is purely a procedural statute for bringing concerns before the Commission and does not create any independent claim, as there is no substantive regulatory obligation or independent statutory compliance obligation placed by it on a public utility. (App. for Rehearing at 17-23.)

{¶ 24} Regardless of the exact nature of R.C. 4905.26, AEP Ohio also argues that it was unreasonable for the Commission to fault AEP Ohio for its actions following *Wingo* because AEP Ohio faced an uncertain legal issue and had no guidance from the Commission. AEP Ohio states that it acted in good faith in its actions toward NEP and other third-party submetering companies, as it tried to understand the implications of the *Wingo* decision on the mirroring effect of Section 18 of the Terms and Conditions of AEP Ohio's tariffs. According to AEP Ohio, any decision it made following *Wingo* would have been problematic, which is why it filed the complaint in this case. AEP Ohio points to different sections of the Opinion and Order in which the Commission found that AEP Ohio did not commit an underlying violation of an existing legal or regulatory obligation and that AEP Ohio's pause on conversions was reasonable. (App. for Rehearing at 23-26.)

{¶ 25} AEP Ohio believes that the Commission denied it due process of law by finding that AEP Ohio violated a rule that did not exist at the time it was supposedly violated. AEP Ohio reiterates its contention that R.C. 4905.26 contains no substantive rules that can be "violated." AEP Ohio argues that a holding that R.C. 4905.26 independently imposes a reasonableness standard, and that AEP Ohio violated that standard with its policies toward NEP, would render the statute unconstitutionally vague. AEP Ohio states that it is, therefore, unreasonable and unlawful for the Commission to find a statutory violation by AEP Ohio based on the Commission "retroactively disagreeing" with AEP Ohio's good faith actions in the wake of the *Wingo* decision. AEP Ohio argues that nothing in R.C. Chapter 49 or the Commission's regulations explicitly prohibit a utility from

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[3] See *In re Richard Ihlendorf v. The Cincinnati Gas and Electric Co.*, Case No. 77-862-GE-CSS, Entry on Rehearing (Feb. 14, 1979); *Ohio Public Interest Action Group, Inc. v. PUCO*, 43 Ohio St.2d 175 (1975).

adopting a policy of not converting existing apartments to master-metered service if a landlord intends to use a third-party submetering company. As the Commission's decision in this case was the first time that such a policy was deemed unreasonable, AEP Ohio states that it could not have known that the policy would be deemed unlawful. (App. for Rehearing at 31-35.)

{¶ 26} Finally, AEP Ohio asserts that a finding that AEP Ohio violated R.C. 4905.26 is unnecessary to reach the same result in this case as to whether NEP is illegally operating as a public utility. AEP Ohio states that the Commission does not need to find a violation of a public utility statute before ordering a public utility to modify its practices. Instead, it need only find that a policy is unreasonable under R.C. 4905.37, and it may then take actions to remedy such practices. (App. for Rehearing at 35-36.)

{¶ 27} NEP responds that the Commission properly granted its counterclaim I, subpart 2, in finding that AEP Ohio's new policy basing approval of requests to convert to master-metered service upon whether a property owner planned to utilize a third-party service provider violates R.C. 4905.26. NEP states that claims for unjust or unreasonable treatment may be brought under the clear and unambiguous language of the statute. NEP accuses AEP Ohio of taking previous Commission entries out of context regarding R.C. 4905.26, pointing out that the *Allianz* entry cited by AEP Ohio is an attorney examiner entry addressing a motion to strike and, further, the complaint count at issue in that case dealt with a duty to serve. In contrast, NEP's counterclaim was against AEP Ohio rendering its service in an unjust, unreasonable, unjustly discriminatory, and unjustly preferential manner – the exact language in R.C. 4905.26. NEP argues that AEP Ohio conflates the Commission's findings that the pausing of third-party conversions may have been proper but that the new blanket denial policy of conversion requests involving third-party submetering companies was unfounded and unreasonable. (Memo Contra at 2-6.)

{¶ 28} NEP is unmoved by AEP Ohio's assertion of its due process rights being violated for similar reasons outlined above, primarily that the counterclaim brought by NEP

mirrors the exact language found in R.C. 4905.26. Thus, NEP dismisses AEP Ohio's void-for-vagueness arguments, as NEP finds nothing vague about the language in R.C. 4905.26. Rather than being subjected to tariff compliance with a rule it did not know existed, as claimed by AEP Ohio, NEP states that AEP Ohio's violation of R.C. 4905.26 was based on its new denial of master-metered conversions involving third-party companies. (Memo Contra at 7-9.)

{¶ 29} First, we address the contention that R.C. 4905.26 is purely procedural and provides no substantive jurisdiction by itself. The Commission denies AEP Ohio's first ground for rehearing but does clarify the extent of its finding with respect to NEP's first counterclaim. The Commission did not devote significant portions of the Opinion and Order to AEP Ohio's R.C. 4905.26 jurisdictional argument – which AEP Ohio first raised in its reply brief, not in its answer to the counterclaims, its amended answer to the counterclaims, at the evidentiary hearing, or in its initial post-hearing brief – but did, nonetheless, consider the argument in formulating the Opinion and Order (Opinion and Order at ¶ 314). Rather, it was implicitly rejected by our narrow and limited finding with respect to NEP's counterclaim Count I, second violation. This is not a departure from past Commission precedent, as the Commission previously dealt with the same argument in a similar fashion. *See In re the Complaint of Sprint Communications Company L.P. v. Ameritech Ohio*, Case No. 96-142-TP-CSS, Entry on Rehearing (Nov. 6, 1997) at ¶ 14 ("[w]e find no error in not specifically commenting upon this portion of Ameritech's arguments in our Opinion and Order because we, nevertheless, rejected it (implicitly by making the findings that we did and explicitly on page 34, when we rejected all arguments raised by the parties but not specifically addressed)."). AEP Ohio's reliance on an attorney examiner entry in *Allianz*, dealing with a distinctly different procedural issue, does not provide support overriding the precedential value of the Commission's *Ameritech* entry. Likewise, AEP Ohio's interpretation of the Commission's ruling in *Ihlendorf* takes it well beyond its intended reach. To find that R.C. 4905.26 is a purely procedural statute would invalidate numerous consumer complaint cases, a large majority of which are brought under R.C.

4905.26 for alleged unjust, unreasonable, or unjustly discriminatory practices by a regulated public utility. A particular practice of a public utility may not be specifically prohibited by statute or rule but could still rise to the level of being unjust or unreasonable based on the facts pleaded in a complaint. R.C. 4905.26 provides the avenue for such complaints to be brought before the Commission, as NEP validly did with its counterclaims in this case. In any event, as AEP Ohio suggests, R.C. 4905.37 provides a separate and sufficient basis for our conclusion that the practice adopted by AEP Ohio of declining to provide master-metered service to the Apartment Complexes in response to the Court's *Wingo* decision, while perhaps undertaken in good faith, nevertheless was not just and reasonable. Accordingly, that statute also provides a jurisdictional basis for prescribing the practices we have directed AEP Ohio to adopt in our Opinion and Order.

{¶ 30} Next, we address AEP Ohio's argument that it was denied due process by being found to have "violated a rule that did not exist at the time." Ultimately, we find it unconvincing. The language of R.C. 4905.26 is unambiguous. That provision authorizes the Commission, among other things, to review allegations that public utilities are engaging in any practice affecting or relating to any service that is in any respect unreasonable or unjust. And the Commission has previously held that R.C. 4905.26 prohibits a public utility from rendering any unjust, unreasonable, unjustly discriminatory, or unjustly preferential charge, rate, or service. *In re MCImetro Access Transmission Services, Inc., v. Ameritech Ohio*, Case No. 97-1490-TP-CSS, Opinion and Order (Aug. 13, 1998) at 20. Consumers routinely file complaints against AEP Ohio under R.C. 4905.26 for alleged unjust or unreasonable practices, which AEP Ohio responds to. In this case, we will clarify that the Commission found that NEP met its burden of proof pursuant to R.C. 4905.26, on a very narrow and limited allegation, based upon AEP Ohio's modified practice of denying property owner requests for conversion of existing buildings to master-metered service based solely on the involvement of a contracted third-party submetering company, to the extent it applied to NEP. While the Commission repeatedly noted that AEP Ohio's uncertainty as to the legal

landscape of submetering post-*Wingo* was reasonable and in good faith,[4] we found that the modification of its existing practice was unjust and unreasonable pursuant to R.C. 4905.26. Moreover, we made no finding in the Opinion and Order that AEP Ohio had provided inadequate service as defined in R.C. 4905.26. We note, again, that R.C. 4905.37 also provides a basis for reaching the same result in an R.C. 4905.26 complaint case. Consequently, we deny rehearing on this assignment of error, but clarify the limited and narrow extent to which we have concluded that NEP has met its burden of proof with regard to its first counterclaim.

B. Second Ground for Rehearing: The "Electric Reseller Tariff" Ordered by the Commission is unlawful under the Commission's Own Interpretation of "Electric Light Company" Under R.C. 4905.03(C), Violates the Statutory Rulemaking Procedures in R.C. Chapter 106, and Results in an Unreasonable Tariff Paradigm.

{¶ 31} In its second ground for rehearing, AEP Ohio asserts that the new electric reseller tariff language directed by the Commission is simply a restatement of the "SSO Price Test" rejected by the Supreme Court in the *Wingo* decision. Rather than complying with the directive from the Supreme Court, AEP Ohio states that the Commission is attempting a "Solomon-like 'split the baby' approach" where it finds that it has no jurisdiction over third-party submetering companies such as NEP but still attempts to implement consumer protections by implementing a "nearly identical" test to the one rejected by the Court in *Wingo*. Further, AEP Ohio argues that by ordering it to file the amended reseller tariff, the Commission expanded the scope of the disconnection rules in Ohio Adm.Code 4901:1-18 and enacted rules of general applicability without following the rulemaking procedures found in R.C. Chapter 106. AEP Ohio states that the Commission manufactured a way to protect tenants by mandating that AEP Ohio's reseller tariff be amended to include certain

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[4] While the Commission noted that AEP Ohio's uncertainty was reasonable, we also noted that the Company's imposing such a policy change in the midst of the dispute seemed to run contrary to AEP Ohio's desire to wait for further Commission guidance on the issue. Opinion and Order (Sept. 6, 2023) at ¶ 262.

language requiring landlords to follow the Commission's disconnection procedures. (App. for Rehearing at 36-41.)

{¶ 32} AEP Ohio believes that the Commission did not, prior to directing that the tariff language be filed, provide notice and opportunity to be heard from entities that will be affected by the amended reseller tariff. AEP Ohio also avers that in its directive the Commission-ordered protections for certain tenants in the state of Ohio (those in AEP Ohio's service territory) and not for tenants throughout the rest of the state. AEP Ohio believes that the type of protections contemplated in the amended reseller tariff language are better suited for the Commission's administrative rules, which would make them applicable to all public utilities and customers across the state, rather than in a proceeding such as this. Further, AEP Ohio asserts that the Commission failed to follow statutory procedures for amending administrative rules. In support, AEP Ohio argues that the protections that the Commission directed AEP Ohio to include in the amended tariff are the "functional equivalent" of new regulations. In particular, AEP Ohio states that Ohio Adm.Code 4901:1-18 already contains disconnection provisions applicable to landlord-tenant circumstances. The Opinion and Order, according to AEP Ohio, slyly exchanges the protections found in Ohio Adm.Code 4901:1-18 for the regulated utility disconnection protections throughout the rest of that chapter. AEP Ohio appears to agree that many of these protections are appropriate for residential customers, but it believes that the Commission did not follow the statutory processes for amending administrative rules contained in R.C. Chapter 119. (App. for Rehearing at 41-46.)

{¶ 33} AEP Ohio asserts that once the Commission found that neither NEP nor landlords are "electric light companies" or "public utilities," then the Commission no longer has jurisdiction over those entities. Therefore, AEP Ohio avers that the Commission cannot attempt to regulate those entities through AEP Ohio's tariffs as if the Commission does have jurisdiction to initiate such regulations. AEP Ohio concedes that the Commission has the authority to adopt wide-ranging regulations governing public utilities, or to institute narrow tariff provisions addressing conduct of those who purchase electricity from AEP

Ohio. The tariff provisions in the Opinion and Order, however, go far beyond these parameters, according to AEP Ohio, and see the Commission attempting to exercise the type of authority that it would have over an "electric light company" under R.C. 4905.03(C). (App. for Rehearing at 46-47.)

{¶ 34} AEP Ohio also questions how the reseller tariff provisions directed by the Commission could even be workably enacted and enforced. AEP Ohio avers that to successfully enforce such a tariff it would have to have access to and review masses of information relating to all master-metered tenants within its service territory. Relatedly, AEP Ohio expresses concern about expending resources on such enforcement actions without cost recovery. To the extent that a third-party submetering company or landlord may be violating the terms of the amended tariff provisions, AEP Ohio questions how such a complaint could be brought, since R.C. 4905.26 covers complaints around the service of a "public utility," which the Commission determined the third-party submetering companies and landlords not to be. AEP Ohio further runs through various hypothetical scenarios in which it is uncertain how the tariff provisions would be enforced. (App. for Rehearing at 46-53.)

{¶ 35} NEP responds that AEP Ohio's second ground for rehearing is premature, which NEP believes stems from AEP Ohio's mistaken assumption that the Opinion and Order directed AEP Ohio to provide a final form tariff within the 90-day window. NEP believes that the type of concerns raised by AEP Ohio can be raised and resolved through the typical Commission review and approval process for tariffs. NEP understood the Commission's directive as instructing AEP Ohio to file a proposed tariff for approval, which Staff will review for compliance, and ultimately the Commission will approve such a tariff in final form. NEP believes that the enforcement concerns and hypotheticals raised by AEP Ohio are also misplaced, as ultimately it will be the Commission enforcing the directed consumer protections, not AEP Ohio. NEP states in the four cases cited in the Opinion and Order, in which the Commission directed gas companies to include certain consumer protections in tariffs, such protections are enforced by the Commission, not the gas utilities.

As an example, NEP points to how competitive retail natural gas service (CRNGS) providers refer marketing non-compliance matters to Staff for investigation and Staff routinely resolve such concerns. NEP offers the use of certifications of compliance from master-meter property owners as a compliance mechanism that could be approved in the normal tariff application process and would then be easily implemented and enforced by AEP Ohio going forward. (Memo Contra at 10-13.)

{¶ 36} The Commission finds that AEP Ohio's second ground for rehearing is without merit. As stated in the Opinion and Order, the Commission has previously noted that it has the authority to regulate public utilities in order "…to set terms and conditions on the resale of a utility's service to ensure that such service is provided in a manner which is safe and consistent with the public interest" and have specifically noted the disconnection procedures in Ohio Adm.Code Chapter 4901:1-18 as an example of this "requisite authority" (Opinion and Order at ¶ 225, citing *In re Complaint of Michael E. Brooks, et al. v. The Toledo Edison Co.*, Case No. 94-1987-EL-CSS, Opinion and Order (May 8, 1996) at 16, footnote 12, citing *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WSCSS, et al., Opinion and Order (Feb. 27, 1992) at 5). We chose to exercise this authority to direct AEP Ohio to file the new electric reseller tariff that includes the conditions outlined in the Opinion and Order (Opinion and Order at ¶ 224). We identified prior precedent where this Commission exercised similar authority over public utilities' tariffs in order to ensure that consumer protections were incorporated into tariffs, such as instructing the natural gas retail choice programs to include reasonable consumer protections in their tariffs (Opinion and Order at ¶ 225). Despite AEP Ohio's disagreement, this directive is not an attempt by the Commission to improperly regulate entities over which it has no jurisdiction; rather, it is a directive for a public utility to put appropriate restrictions in a tariff as conditions to receive service pursuant to that tariff. In fact, similar behind-the-meter restrictions are included in other AEP Ohio tariffs for other behind-the-meter services, such as those dealing with interconnections. See, e.g., *In re the Commission's Promulgation of Amendments to Rules for Electric Service and Safety Stds. Pursuant to R.C. Chapter 4928*, Case Nos. 99-1613-EL-ORD, et

al., Finding and Order (Aug. 22, 2002); *In re the Application of the Columbus S. Power Co. for Authority to Revise Tariff P.U.C.O. No. 6 Minimum Requirements for Distribution System Interconnection*, Case Nos. 07-1303-EL-ATA, et al. Finding and Order (Sept. 24, 2008); *In re the Application of Ohio Power Co. for Approval to Establish a Generation Station Power Tariff*, Case No. 18-1313-EL-ATA, Finding and Order (Mar. 6, 2019). Nothing raised in AEP Ohio's Application for Rehearing alters our finding that this directive is within the Commission's authority, as the provisions which are to be included in the new reseller tariff are consistent with the public interest of protecting tenants who may lose rights related to electric service if living at a master-metered complex within AEP Ohio's service territory. Likewise, the Commission disagrees with AEP Ohio's assertions that it engaged in some sort of ad hoc rulemaking by issuing the reseller tariff directive in the Opinion and Order. It is well within the Commission's statutory authority to order a tariff amendment as a result of a complaint proceeding before us, as well as consistent with Commission precedent. See, e.g., *In re the Complaint of the Office of the Consumers' Counsel on Behalf of the Residential Customers of The Dayton Power & Light Co. v. The Dayton Power & Light Co.*, Case No. 90-455-GE-CSS, Opinion and Order (Oct. 18, 1990). Further, the Commission expects that other electric distribution utilities (EDUs) will open separate case dockets in which each EDU will file an application to amend its reseller tariff language consistent with the directives contained in the Opinion and Order. At that time, as in AEP Ohio's future tariff filing, interested parties will have a full and fair opportunity to address any proposed tariffs as provided by R.C. 4909.18. See *In re the Certification of Northeast Ohio Public Energy Council as a Governmental Aggregator,* Case No. 00-2317-EL-GAG, et al., Entry (Sept. 7, 2022) at ¶ 14.

{¶ 37} With respect to AEP Ohio's concerns about the potential impact of the tariff and difficulties that may be experienced enforcing it, the Commission agrees that such concerns are premature. An Entry was issued on December 1, 2023, in this case docket which extended the deadline for AEP Ohio to file the new reseller tariff to February 5, 2024, which will allow AEP Ohio ample opportunity to prepare a tariff application containing the

necessary language and to begin to engage with Staff and other interested parties to formulate solutions to such concerns.[5]

{¶ 38} Based on the foregoing, AEP Ohio's second ground for rehearing is denied.

C. Third Ground for Rehearing: The Commission's Application of the Jurisdictional Statute, R.C. 4905.03(C), to NEP is Legally and Factually Erroneous.

{¶ 39} In its third assignment of error, AEP Ohio argues that the Commission's determination that NEP is not "engaged in the business of supplying electricity" under R.C. 4905.03(C) and therefore is not an "electric light company" or "public utility" is contrary to the plain meaning of that statute. AEP Ohio disagrees with the Commission's conclusion that in a submetered setup, it is the landlord and not the tenants that are "consumers" under R.C. 4905.03(C). AEP Ohio submits that the common definition of a consumer applies to individual tenants, citing dictionary definitions as support. Regarding the Ohio Supreme Court cases which clearly determined landlords to be the consumers, AEP Ohio offers that none of those cases indicated whether submetered tenants could *also* be consumers. Further, AEP Ohio argues that the Commission's interpretation of the Supreme Court's decisions in *Pledger v. Public Utilities Commission*, 2006-Ohio-2989 (*Pledger*) and other cases cannot be reconciled with the Supreme Court's reasoning in the *Wingo* decision. AEP Ohio avers that if *Pledger* stands for the proposition that tenants are not consumers, the Court would have simply made such a determination and not remanded the case to the Commission. AEP Ohio contends that both the landlord and its tenants are consumers as contemplated in R.C. 4905.03(C). Further, AEP Ohio notes that the Commission's new regulation of submetering through its ordered "electric reseller tariff" indicates that electricity is being resold by a landlord to someone – in this case the tenants. AEP Ohio asserts that such a "resale" means the tenants must be "consumers." (App. for Rehearing at 53-61.)

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[5] The December 1, 2023 Entry also clarified that the proposed tariff application be filed in a separate docket in which all interested parties will have a full and fair opportunity to raise any issues regarding the application. Entry (Dec. 1, 2023) at ¶ 21.

{¶ 40} Similarly, AEP Ohio finds the Commission's conclusion that NEP is not "engaged in the business of supplying electricity" under R.C. 4905.03(C) to be inconsistent with the statute. AEP Ohio claims that the Commission's conclusion is based on formalisms such as agency rather than focusing on the plain meaning of the phrases. AEP Ohio again urges the Commission to focus on "substance over form" when applying the definitions in R.C. 4905.03(C). AEP Ohio asserts that if an entity such as NEP is performing actions that public utilities typically carry out, then that entity essentially steps into the shoes of a public utility. AEP Ohio then restates a number of these alleged actions that it previously outlined in its post-hearing briefs. AEP Ohio states that the Opinion and Order does not engage with this list of actions, but instead focuses on a legal formalism such as "agency" to find that NEP is not engaged in the business of supplying electricity. AEP Ohio restates its arguments concerning the legal status of principals and agents, as fully outlined in its post-hearing briefs. (App. for Rehearing at 61-69.)

{¶ 41} NEP responds that AEP Ohio's third ground for rehearing is a repackaging of the arguments AEP Ohio made at the evidentiary hearing and in post-hearing briefs. As this ground for rehearing raises no new arguments, NEP believes that it should be denied for the reasons already set forth in the Opinion and Order. NEP believes that the Commission was correct in finding that NEP is not engaged in the business of supplying electricity and that this conclusion is supported by the plain meaning of R.C. 4905.03(C). With respect to the definition of "consumer," NEP agrees with the Commission that there is long-established and determinative case law that identifies the landlord, not the tenant, as the "consumer" in a master-meter context. NEP disagrees with AEP Ohio's arguments as to what the Supreme Court could have done in *Wingo* if tenants are not "consumers" as pure speculation, as the Court was not tasked with determining whether NEP is a public utility. NEP avers that AEP Ohio offers no new arguments relating to the agency relationship between NEP and the landlords at the Apartment Complexes and that the Commission's findings on this matter remain correct. (Memo Contra at 13-19.)

{¶ 42} The Commission finds AEP Ohio's third ground for rehearing to be without merit. As pointed out by NEP, the arguments raised in this section of the Application for Rehearing are essentially the same as those already raised by AEP Ohio in its post-hearing briefs and were already fully considered by the Commission in making the findings in the Opinion and Order. AEP Ohio itself acknowledges this in the Application for Rehearing, repeatedly making statements such as "as previously explained int its Initial Brief…and its Reply Brief" or other sweeping references to specific portions of its initial brief and reply brief (App. for Rehearing at 61, 62, 65, 66, 68). The Commission already thoroughly considered and addressed the arguments raised by AEP Ohio in this assignment of error and rehearing should be denied on that basis. The Commission notes, nonetheless, that the evidence in the record demonstrates that NEP is not engaged in the business of supplying electricity or an electric light company under R.C. 4905.03(C) nor a public utility under R.C. 4905.02(A) (Opinion and Order at ¶¶ 1, 179, 197, 207, 322). The Commission is also unpersuaded by AEP Ohio's repeated arguments as to the definition of "consumer" in the context of master-metered service and reaffirms its finding that the approximate 90-years of precedent relied upon by the Commission establishes the landlord as the "consumer" in this context (Opinion and Order at ¶¶ 188-192). Finally, the Commission thoroughly addressed the issues of agency between NEP and the landlords and sees no argument to alter this analysis and associated findings (Opinion and Order at ¶¶ 209-216). AEP Ohio's third assignment of error is, therefore, denied.

D. Fourth Ground for Rehearing: The Commission's Stay Order and Final Order Were Unlawful Because the Commission Failed to Consider Whether AEP Ohio's Forced Abandonment of the Apartment Complexes Was "Reasonable" and Promoted the "Welfare of the Public" Under the Miller Act.

{¶ 43} AEP Ohio restates arguments made in its initial post-hearing brief that the Commission acted unlawfully by not determining whether such conversions are "reasonable" under the Miller Act. In its initial brief, AEP Ohio argued that if the Apartment Complexes were converted to master-metered service then the tenants would cease to be AEP Ohio customers and the equipment at the sites would be abandoned. AEP Ohio argued

that withdrawing its direct service to these tenants would be unreasonable because of the loss of regulatory protections afforded to Ohio customers. AEP Ohio takes issue with the Opinion and Order only devoting a single paragraph to its Miller Act arguments, wherein the Commission rejected the arguments on procedural rather than substantive grounds. AEP Ohio states that it did not waive its Miller Act arguments, as the Miller Act applies to the conversions whether or not AEP Ohio properly plead such a violation in the complaint. AEP Ohio argues, essentially, that the Stay Entry ripened AEP Ohio's alleged Miller Act arguments. Despite R.C. 4905.21 referring to an "application" to abandon filed by a public utility, AEP Ohio believes that R.C. 4905.20 "anticipates" situations such as in this proceeding. Further, AEP Ohio insists that it did clearly invoke the Miller Act in its complaint, as it referenced the Miller Act in in five different paragraphs of the complaint. AEP Ohio believes that the complaint meets the standard notice pleading requirements found in the Ohio Rules of Civil Procedure or, at the very least, such a claim could be "inferred" by the Commission. AEP Ohio disagrees that the Miller Act arguments are moot because the conversions already occurred following the Stay Entry. Finally, AEP Ohio does not believe that the Miller Act required it to file a separate application for abandonment in order to invoke the Miller Act in this case. (App. for Rehearing at 69-80.)

{¶ 44} NEP responds that the Commission's determinations as to the Miller Act arguments are consistent with both the law and evidentiary record in this proceeding. NEP views the deferred emphasis on Miller Act arguments as AEP Ohio attempting to once again challenge the Stay Entry. NEP states that AEP Ohio failed to raise a Miller Act issue in its complaint and that it is not the job of the Commission to "infer" particular claims that a party wishes to make. Further, NEP notes that the conversions of the Apartment Complexes were completed nearly a year ago, making the question as to the "reasonableness" of the conversions moot. NEP recounts that AEP Ohio filed an application for rehearing of the Commission's July 27, 2022 entry affirming the Stay Entry, which was denied by operation of law under R.C. 4903.10. AEP Ohio filed no appeal of this denial of the application for rehearing and cannot, according to NEP, now make an untimely appeal of the Stay Entry.

NEP agrees that AEP Ohio waived its Miller Act arguments by not properly asserting such a claim in its complaint. NEP points out that AEP Ohio's complaint specifically identified three counts and none of them referenced the Miller Act. NEP argues that such a pleading falls short of the notice pleading standards contained in the Ohio Rules of Civil Procedure. Finally, NEP asserts that the Miller Act is not applicable to conversions to master-metered configuration on private property. (Memo Contra at 20-30.)

{¶ 45} The Commission finds that AEP Ohio's fourth ground for rehearing is without merit. The Commission devoted only a single paragraph to this issue in the Opinion and Order because the Miller Act did not play a significant role in the pleadings of this case or at the evidentiary hearing. In its lengthy and thorough complaint, AEP Ohio clearly enumerated three counts: Count I – unlawful provision of noncompetitive electric service (Complaint at ¶¶ 76-87); Count II – violation of the Certified Territory Act (Complaint at ¶¶ 88-91); and Count III – unlawful provision of competitive retail electric service (Complaint at ¶¶ 92-95). Nowhere in the paragraphs of these specified counts is the Miller Act, R.C. 4905.20, or R.C. 4905.21, mentioned. Clearly AEP Ohio understood that it needed to identify the specific violations of law and/or regulations that it alleged NEP to have committed, yet it failed to include a count concerning the Miller Act. The Commission does not infer the arguments or claims that a sophisticated party appearing before it may desire to make. *In re the Complaint of Pat Nussle v. Ohio Power Co.*, Case No. 14-1659-EL-CSS, Opinion and Order (Jan. 15, 2020) at ¶ 51, citing *In re the Application of The East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 11-5843-GA-RDR, Entry on Rehearing (Dec. 12, 2012); *In re the Complaint of Cleveland Metropolitan School Dist. v. The Cleveland Elec. Illum. Co.*, Opinion and Order (Apr. 20, 2022) at fn. 4. The Miller Act violation was not properly pleaded in AEP Ohio's complaint and, based on this, the Commission denies this fourth assignment of error.

IV. ORDER

{¶ 46} It is, therefore,

{¶ 47} ORDERED, That AEP Ohio's Application for Rehearing filed on October 6, 2023, be denied. It is, further,

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

COMMISSIONERS:
Approving:
Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

DMH/dr

Summary: Entry on Rehearing denying the application for rehearing filed by Ohio Power Company on October 6, 2023 electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING OF OHIO POWER COMPANY

Under R.C. 4903.10 and OAC 4901-1-35, Ohio Power Company ("AEP Ohio or the "Company") respectfully submits this Application for Rehearing of the Commission's September 6, 2023 Opinion and Order in this proceeding ("Opinion and Order"). As explained in the accompanying Memorandum in Support, the Opinion & Order was unlawful and unreasonable in the following respects:

I. *First Ground for Rehearing*: The Commission's "Narrow and Limited" Ruling in Favor of NEP on Part 2 of NEP's Count I Is an Unreasonable and Unlawful Application of the Complaint Case Statute, R.C. 4905.26.

A. The Complaint Case Statute, R.C. 4905.26, Is a Jurisdictional and Procedural Mechanism, Not an Independent Standard that Entities Can "Violate."

B. It Is Unreasonable to Fault AEP Ohio for Its Actions Following the *Wingo* Complaint Dismissal Because AEP Ohio Faced an Uncertain Legal Issue with No Guidance from the Commission, and AEP Ohio Acted in Good Faith and Simultaneously Brought the Issue to the Commission for Decision.

C. The Commission Denied AEP Ohio Its Right to Due Process of Law by Finding that AEP Ohio "Violated" a Rule That Did Not Exist at the Time.

D. A Finding that AEP Ohio "Violated" R.C. 4905.26 Is Not Necessary to Reach the Same Result in This Case Including the Decision to Direct Changes to AEP Ohio's Practices or Tariff.

II. ***Second Ground for Rehearing*: The "Electric Reseller Tariff" Ordered by the Commission Is Unlawful Under the Commission's Own Interpretation of "Electric Light Company" Under R.C. 4905.03(C), Violates the Statutory Rulemaking Procedures in R.C. Chapter 106, and Results in an Unreasonable Tariff Paradigm.**

A. The Commission's Reinstatement of the "SSO Price Test" Through a Tariff Contravenes the Express Instructions of the Supreme Court's Remand Order in *Wingo*.

B. By Ordering the "Electric Reseller Tariff," the Commission Expanded the Scope of Its Disconnection Rules (OAC 4901:1-18) and Enacted Other Rules of General Applicability Without Following the Statutory Rulemaking Procedures in R.C. Chapter 106.

1. The Commission Did Not Provide Adequate Notice and Opportunity to Be Heard.

2. The Commission Discriminatorily Ordered Protections for Certain, but Not All, Tenants in the State of Ohio.

3. The Commission Failed to Follow Mandatory Statutory Procedures Required to Amend the Administrative Rules.

C. It Is Unlawful and Exceeds the Commission's Statutory Jurisdiction Under R.C. 4905.03(C) for the Commission to Conclude that NEP (and Landlords) Are Not "Electric Light Companies" and Yet Regulate Them Through AEP Ohio's Tariff's as if They Were.

D. The "Electric Reseller Tariff" Is Unworkable for Several Reasons.

III. ***Third Ground for Rehearing*: The Commission's Application of the Jurisdictional Statute, R.C. 4905.03(C), to NEP Is Legally and Factually Erroneous.**

A. The Commission's Definition of "Consumer" in R.C. 4905.03(C) Is Contrary to That Term's Plain Meaning.

B. The Commission's Conclusion that NEP Is Not "Engaged in the Business of Supplying Electricity" Under R.C. 4905.03(C) Is at Odds with the Plain Meaning of "in the Business of" and "Supplying" and Incorrectly Credits Formalisms Such as "Agency" That Cannot Be Found in the Statute.

IV. ***Fourth Ground for Rehearing*: The Commission's Stay Order and Final Order Were Unlawful Because the Commission Failed to Consider Whether AEP Ohio's Forced Abandonment of the Apartment Complexes Was "Reasonable" and Promoted the "Welfare of the Public" Under the Miller Act, R.C. 4905.20-.21.**

A. AEP Ohio Did Not Waive Its Miller Act Arguments.

B. AEP Ohio's Miller Act Arguments Are Not Moot.

C. AEP Ohio Was Not Required to File a "Separate Application for Abandonment" to Properly Invoke the Miller Act in This Proceeding.

D. On Rehearing, the Commission Should Conclude that the Required Conversions to Master Meter Service Are Unreasonable Under the Miller Act.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

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INTRODUCTION

AEP Ohio's resale tariff as approved by the Commission mirrors Ohio law as it might change over time (*e.g.*, through caselaw such as the Supreme Court's *Wingo* decision): it restricts "unlawful" resale. There was a gap in the law left by the *Wingo* remand, and after *Wingo* it was unclear what constituted "unlawful" resale. AEP Ohio brought this complaint against NEP to seek guidance from the Commission on how to interpret its tariff and, while a decision was pending, to preserve the *status quo* for 1,171 AEP Ohio customers at five apartment complexes in AEP Ohio's service territory. As *Wingo* recognized, previous cases had addressed an original form of submetering where (a) the resale was conducted by the *landlord itself*, and not a third party; (b) the resale was conducted on the landlord's own property (*i.e.*, property that the landlord owned); (c) the landlord was merely recovering its electric costs (including, sometimes, an administrative fee) from tenants, and not attempting to generate a substantial profit; and (d) the resale of electricity was "ancillary" to the landlord's principal business of leasing residential or commercial real estate to tenants. *Wingo* contrasted this original form of submetering with what it called the "third party," "big business" form of submetering, where (a) the resale involved a "third party," not just the landlord; (b) the third party operated at "multiple properties" that it does not own; (c) the third-party reseller was generating substantial "profit," not just recovering costs; and (d) submetering is the third-party reseller's primary business, and is not "ancillary" to some other business the third-party reseller engages in. In his separate opinion, Commissioner Conway correctly and emphatically observed that the facts in this case are "novel and unprecedented" and do not "remotely resemble" the facts presented in prior submetering cases.

Unfortunately, the Opinion and Order brushes off this critical distinction as "background" in the Supreme Court's decision and sidesteps the Court's remand directive to apply the statutory provisions to the novel facts of large-scale third-party submetering practices. Instead, the Opinion and Order chooses to affirmatively sanction NEP's anti-consumer scheme by concluding based on "form over substance" that NEP is merely an agent for landlords that falls within the judicially-established landlord-tenant exception. After retrospectively finding that AEP Ohio somehow violated R.C. 4905.26 (the complaint case statute) by acting in good faith to implement its Commission-approved tariff in the wake of the *Wingo* vacatur, the Commission directs AEP Ohio to implement an even more problematic regulatory tariff solution that unlawfully attempts to regulate landlords. One of the tariff provisions ordered by the Commission unlawfully resurrects the same SSO price cap theory of jurisdiction that was just vacated by the Supreme Court. Moreover, the impractical tariff directive imposes an unreasonable burden on the Company and places it in even more peril going forward. In addition, the Opinion and Order violates the Miller Act, R.C. 4905.20-4905.21. Fundamentally, the Commission's decision is unlawful and unreasonable in four ways.

First, the Commission erred by endorsing a stray, minor argument of NEP's and finding that AEP Ohio "violated" R.C. 4905.26 "on a narrow and limited basis" at least "to the extent it applies to NEP." In so doing, the Commission incorrectly interpreted R.C. 4905.26 as a source of substantive rights as opposed to its intended purpose as a procedural vehicle to enforce a statute that establishes a substantive right (*e.g.*, R.C. 4905.35). The Commission has previously had correctly held that R.C. 4905.26 "operates as the *procedural* vehicle for bringing the complaint before this Commission." Holding that AEP Ohio "violated" R.C. 4905.26 is like saying the Commission "violates" the appeal statute, R.C. 4903.13, when the Supreme Court

reverses or vacates the Commission's order – as it did in *Wingo*. It is like concluding that a utility "violates" R.C. Chapter 4909 when the Commission orders new rates to replace the existing rates (the latter of which were, of course, previously approved by the Commission as being just and reasonable). Rather, the Commission was correct in the *Ihlendorf* case to conclude that R.C. 4905.26 is merely a procedural vehicle for raising concerns before the Commission and the *Allianz* decision was correct in concluding that the complaint case statute creates no independent claim.

The Commission also erred in faulting AEP Ohio for taking a position on a tariff provision that was neither self-executing nor unambiguous. The stark reality of AEP Ohio's situation was that, after dismissal of the *Wingo* complaint on remand and the lack of a Commission investigation or rulemaking, AEP Ohio was forced to decide how to interpret the "unlawful resale" provision of its tariff. The Commission's previous guidance, the "modified *Shroyer* test," had been vacated by the Court, and the Commission had provided no replacement test or any other guidance when it dismissed *Wingo* on remand. This situation necessarily demanded that AEP Ohio freshly scrutinize the factual and legal analysis of NEP's request to convert the five buildings at issue here to submetering, which AEP Ohio's legal counsel literally communicated to NEP the day after the *Wingo* decision was issued.

Significantly, in rejecting NEP's other counterclaims, the Opinion and Order itself affirmatively and repeatedly sanctions AEP Ohio's decision to bring this complaint case and emphasizes the difficulty of determining whether NEP engages in "unlawful resale." It was only after an "intense and in depth review" that the Commission determined that large-scale third-party submetering was lawful in light of the *Wingo* remand.

Even if AEP Ohio's policy was "unfounded and unreasonable," which AEP Ohio contests, adopting that policy cannot have violated a statute that does not, *itself*, prohibit unfounded or unreasonable policies. Holding that R.C. 4905.26 *independently* imposes a reasonableness standard, and that AEP Ohio's policy violated that standard, would render the statute unconstitutionally vague. The void-for-vagueness doctrine reflects the principle that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Similarly, in the absence of an established standard based in a statute, lawful rule, or Commission order, it is unreasonable and unlawful to form a statutory violation based purely on retroactively disagreeing with the Company's good faith actions in attempting to apply its Commission-approved tariff. A utility is constantly required to interpret and apply its tariffs and it cannot reasonably be considered a statutory violation to do so. Doing so is akin to unlawful retroactive ratemaking. The "violation" finding should be reversed or modified on rehearing.

Second, the Commission erred by *sua sponte* ordering AEP Ohio to establish a new "reseller tariff." The Commission ordered AEP Ohio to file tariffs requiring that: (1) a landlord's lease agreement contain a notice in all capital letters that the tenant agrees to have the landlord secure and resell electricity and that the customer will no longer be under the Commission's jurisdiction; (2) the landlord's resale of electricity is at an amount the same or lower than what a similarly situated SSO customer would pay; and (3) landlord disconnection of service to a tenant will follow the rules set forth in Ohio Adm. Code 4901:1-18 (collectively referred to as "Tariff Directive"). These tariff provisions unreasonable and unlawful for several reasons. Once the Commission disclaimed jurisdiction over the resale of electric service in submetering, the

Commission divested itself of jurisdiction to impose any regulations on that industry. In addition, the Commission's attempt to protect tenants by resurrecting the SSO Price Test flies directly in the face of the *Wingo* decision from just a few years ago. Moreover, the Commission also abridged the due process protections afforded to those that are impacted by this decision, which will be discriminatorily applied. Imposing half-measures will only serve to further confuse jurisdiction, place tremendous burden on AEP Ohio, and potentially harm a number of unknown parties, including tenants, that were not afforded an opportunity to heard.

Parties that will be impacted by this decision, including but not limited to AEP Ohio, were not given the requisite opportunity to be heard on these changes, which will result in discriminatory application of the Tariff Directive. This "split the baby" approach has also thrust AEP Ohio into an untenable position of having to police an immeasurable number of private entities (landlords/submetering companies) over which AEP Ohio retains no control and fails to solve for the jurisdictional conundrum of enforcing the Tariff Directive. Notably, the Commission's reinstatement of the "SSO Price Test" through a tariff contravenes the express instructions of the Supreme Court's remand order in *Wingo*. For these reasons, the Commission's decision requiring AEP Ohio to implement the Tariff Directive is unreasonable and unlawful.

Based upon the modified *Shroyer* Test, the Commission had found that NEP was not a public utility. But in reversing the Commission's determination, the Supreme Court of Ohio found that "whether someone is 'harmed' isn't a jurisdictional question; it is a merits question that can be answered ***only after*** it is determined that an activity falls within the PUCO's jurisdiction." The Opinion and Order's Tariff Directive is explicitly adopted to redress the "consumer" harms exposed and detailed through the testimony AEP Ohio witness Lesser. The Commission acknowledges the shocking loss of rights and protections that are afforded to

residential customers of regulated utilities to ensure that they "receive adequate, safe, and reasonable electric service, as required by law." But in finding "that NEP is not a public utility and therefore not subject to our jurisdiction" the Commission was forced to also find that it "lack[ed] the power to directly regulate NEP's actions."

Tariffs, however, reflect the terms and conditions of utility service that are enforceable by the utility, its customers, and the Commission. Therefore, under the Commission's ruling in this case, so long as submetering companies (such as NEP) and landlords do not charge more than the SSO, they will be outside the Commission's reach. By ordering the Tariff Directive, the Commission expanded the scope of its disconnection rules (OAC 4901:1-18) and enacted other rules of general applicability without following the statutory rulemaking procedures in R.C. Chapter 106. But it did so without following mandatory rulemaking requirements. The Commission did not provide adequate notice and opportunity to be heard. The Commission discriminatorily ordered protections for certain, but not all, tenants in the State of Ohio.

Third, the Commission should have applied the plain language of R.C. 4905.03(C) and concluded that NEP is "engaged in the business of supplying electricity . . . to consumers" and, therefore, is an "electric light company" and "public utility" under Ohio law. The Commission's contrary conclusion was erroneous because it interpreted R.C. 4905.03(C) in a manner that is contrary to the plain meaning of the statutory text and because it disregarded the substantial evidence in this case showing that NEP is, in substance, operating as a public utility. Instead, the Commission adopted NEP's "agency" formalism, which has no basis in law.

The Commission's initial error in applying R.C. 4905.03(C) was to interpret the word "consumer" in a manner that goes against that word's ordinary meaning. The Supreme Court has repeatedly held that statutory text should be interpreted according to the ordinary, dictionary

definitions of the words used, and dictionaries define "consumer" to mean a person that "utilizes" or "uses" an "economic good" or "service." Here, that means that the tenant of a submetered building who *uses electricity* to cook food, watch tv, dry clothes, etc. in her apartment must be a "consumer." Indeed, there is no question that the tenant is a "consumer" under R.C. 4905.03(C) on *Day One*, before submetering, when AEP Ohio serves the tenant directly. On *Day Two*, when the building converts to submetering, nothing changes about the way the tenant *uses electricity*, and the only reasonable interpretation of the statute is that the tenant remains a "consumer."

Rather than apply the ordinary meaning of the word "consumer," the Commission relied on inapposite Supreme Court cases that held that landlords of submetered buildings are "consumers" of electricity under R.C. 4905.03(C). But none of those cases addressed the critical question here – whether tenants in submetered buildings are ***also*** "consumers." Indeed, we know these cases did not foreclose a determination that submetered tenants are "consumers," for if they had, the *Wingo* decision (which thoroughly discussed this precedent) would have recognized this and held that precedent dictates that no submetering entity (whether landlord or NEP) can be "engaged in the business of supplying electricity . . . to *consumers*" under R.C. 4905.03(C). The fact that the Court did *not* hold this, but rather remanded the case to the Commission, logically entails that the precedent the Commission cites did not foreclose a determination that landlords and tenants in submetered buildings are ***both*** "consumers" under R.C. 4905.03(C). That, as discussed above, is the only reasonable way to apply the plain meaning of the order "consumer" in this context.

The Commission further erred in applying R.C. 4905.03(C) to NEP disregarding the substantial, detailed, comprehensive evidence in the record showing that NEP is "engaged in the

business of supplying electricity." R.C. 4905.03(C). To very briefly summarize the voluminous record, there was essentially undisputed evidence showing that NEP:

- Installs and operates all distribution equipment at a submetered building at its own expense.
- Maintains and repairs all distribution equipment at its own expense.
- Buys electricity at the master-meter at its own expense, including paying for distribution service from AEP Ohio and arranging and paying for generation service from a CRES.
- Reads meters, sends bills to tenants based on their usage, and collects *and keeps* the money that tenants pay for electric service.
- Offers tenants payment plans and maintains a customer service center to answer tenant questions about service and billing.
- Disconnects the electric service for tenants who do not pay their bills.

(*See infra* Section III.B for record citations.) All these activities are the *indicia* of an entity "engaged in the business of supplying electricity." R.C. 4905.03(C). They are the very same activities that AEP Ohio conducts when it serves tenants in an apartment building that is not submetered.

Despite being undisputed facts, the Opinion and Order did not seriously consider any of these activities or attempt to apply the record facts to meaning of the words "engaged in the business of supplying electricity" in R.C. 4905.03(C). Instead, the Commission credited a formalism invented by NEP: "agency." Following NEP, the Commission reasoned that if a landlord is allowed to submeter its tenants under existing precedent, then the landlord's "agent" must be permitted to do so too. This reasoning was erroneous in several ways.

As *Wingo* explained, landlords have been allowed to submeter tenants because landlords are "engaged in the business" of *renting apartments*, and submetering is merely "ancillary" to this "business." The record here, however, shows that NEP is not engaged in the business of being a landlord or renting apartments, but rather NEP "engaged in the business" of *submetering*

– that is, to use the Commission's own terminology, the business of "*reselling*" electricity. That differentiates NEP from landlords, and the Commission should have evaluated NEP own its own, rather than applying the legal status of landlords automatically to NEP.

In addition, the Commission's "agency" reasoning fails because, as a matter of law, the special legal status of principals (here, landlords) does ***not*** automatically confer to their agent (here, NEP). This kind of "legal status transfer" has no basis in the "black letter agency law" that NEP cited in support of its agency theory. For instance, an attorney may hire a non-attorney agent to enter into contracts on the attorney's behalf, but that agency relationship does not give the non-attorney agent the right to practice law. Whether the agent has a certain legal status (right to practice law) depends on whether the *agent herself* is duly licensed; it does not depend on the legal status of the principal.

Moreover, even if legal status did transfer from principal to agent (it does not), the record contains key facts showing that NEP *cannot, as a matter of law,* be NEP's agent. Namely, there are ways in which NEP does not follow landlord-tenant law – most notably, landlords are prohibited by law from disconnecting tenants' electric service, *see* R.C. 5321.12, yet NEP regularly disconnects for nonpayment. NEP cannot have it both ways. Either NEP is the landlord's agent for all parts of the law or it is not; it cannot pick and choose compliance with the law, being an agent for some parts of the Revised Code but not others. Since NEP has chosen not to be an agent of the landlord for purposes of the prohibition on landlord utility disconnections in R.C. 5321.12, it cannot now claim to be an "agent" of the landlord for purposes of R.C. 4905.03(C).

Fourth, because it was unlawful for the Commission to direct AEP Ohio to convert the five Apartment Complexes to master metered service without first determining, under the Miller

Act, whether such conversions are "reasonable," the Opinion and Order violates the Miller Act. As AEP Ohio noted on brief, the Miller Act provides that no public utility shall "be required to abandon or withdraw any … electric light line … or any portion thereof, … or the service rendered thereby" without holding a hearing to "ascertain the facts" and determine that the proposed abandonment is "reasonable, having due regard for the welfare of the public … ." (R.C. 4905.20 & R.C. 4905.21.)

The Commission's Opinion and Order, although lengthy, devotes only a single brief paragraph to AEP Ohio's contentions regarding the Miller Act. That short paragraph provides three bases for the Commission's rejection of those contentions. Notably, all three of these bases are procedural or prudential in nature; none of them address the merits of whether the required conversions are, in fact, "reasonable" under the Miller Act. Initially in this regard, the Commission implies (but does not directly state) that AEP Ohio waived its Miller Act arguments because "AEP Ohio's three counts within its Complaint do not specifically assert a Miller Act violation under R.C. 4905.20 and 4905.21." Next, the Commission concludes that because the conversions of the Apartment Complexes were already completed before the Commission issued its Opinion and Order, "any determination as to proper abandonment is moot." Finally, the Commission asserts that "AEP Ohio filed no separate application for abandonment for the Apartment Complexes based upon which we could make a decision." All three of these grounds for rejecting AEP Ohio's Miller Act claim are unlawful and unreasonable and conflict with the manifest weight of the record.

AEP Ohio *did* clearly invoke the Miller Act in writing, in Paragraph 4 of its Complaint, by stating that AEP "strongly values its relationship with its customers and *should not be forced to abandon them*." (Emphasis added.) AEP Ohio also expressly asked the Commission not to

"force" AEP Ohio to "abandon" its customers in Paragraphs 10, 70, 71, and 74 of the Complaint. And in its prayer for relief, AEP Ohio expressly requested a "finding and order that AEP Ohio need not terminate service to the Apartment Complex Customers and that AEP need not reconfigure and establish master meter service to the Apartment Complexes." Under black letter notice pleading standards, that is more than enough to raise the Miller Act issue for decision here. The alleged "mootness" of the determination, moreover, was caused only because the Commission required AEP Ohio to convert the apartment complexes in its Stay order, which *also* failed to address "reasonableness" and the "public interest" as required by the Miller Act. The Commission cannot escape the statutorily required Miller Act inquiry by granting interim relief without addressing the Miller Act and then later holding the Miller act issue is moot. Lastly, AEP Ohio was not required to file a separate abandonment proceeding. The statute contains no such "separate case" requirement, and the Commission has previously addressed Miller Act claims in a single proceeding along with other claims.

In sum, due to these four major errors, the Commission should reverse or modify its Opinion and Order on rehearing.

ARGUMENT

I. *First Ground for Rehearing*: The Commission's "Narrow and Limited" Ruling in Favor of NEP on Part 2 of NEP's Count I Is an Unreasonable and Unlawful Application of the Complaint Case Statute, R.C. 4905.26.

Out of all the vast arguments presented on both sides of this case by AEP Ohio and NEP, the Commission only accepted one of them: finding in Paragraph 262 of the Opinion and Order that Part 2 of NEP's Count I challenging AEP Ohio's new policy of basing approval of conversions requests on whether a third party submetering company is involved violates R.C. 4905.26 "on a narrow and limited basis" at least "to the extent it applies to NEP." Out of NEP's 107-page Merit Brief and 96-page Reply Brief, it spent less than two pages in each brief

presenting this argument. (NEP Br. at 88-89; NEP Reply Br. at 73-74.) This allegation was clearly not a focus of NEP's efforts in this case, and it was unreasonable, unlawful, and against the manifest weight of the record in this case for the Commission to adopt this contention as the only point it agreed with in the entire case – even on a limited and narrow basis as applied to NEP.

A. The Complaint Case Statute, R.C. 4905.26, Is a Jurisdictional and Procedural Mechanism, Not an Independent Standard that Entities Can "Violate."

The Commission, in adopting this stray argument from NEP, appears to be improperly relying upon R.C. 4905.26 as a source of substantive rights as opposed to its intended purpose as a procedural vehicle to bring a cause of action pursuant to a statute that establishes a substantive right (*e.g.*, R.C. 4905.35). The complaint case statute, R.C. 4905.26, only sets forth the mechanism by which the Commission can adjudicate disputes and change utility practices and tariffs. As the Commission has previously held, the complaint case statute itself does not create any substantive rules that entities can "violate." The violation finding in Paragraph 262 is unlawful and departs from past Commission precedent without explanation or basis – despite AEP Ohio presenting an explicit argument citing precedent on this point. (AEP Ohio Reply Brief 56-57.)

The Commission has previously held that R.C. 4905.26 "operates as the *procedural* vehicle for bringing the complaint before this Commission." *In the Matter of Richard Ihlendorf v. The Cincinnati Gas and Electric Co.*, Case No. 77-862-GE-CSS, Entry on Rehearing at 2 (Feb. 14, 1979) (emphasis added); *see also Ohio Public Interest Action Group, Inc. v. PUCO*, 43 Ohio St.2d 175, 180 (1975). More recently, in the case *In Re Allianz US Global Risk Ins. Co. v. FirstEnergy Corporation*, the attorney examiner found that "the language in Section 4905.26, Revised Code, is entirely procedural in nature. . . [i]t explains what types of claims may be made

in a complaint and, procedurally, how the Commission shall assert its jurisdiction." The Attorney Examiner expressly found that R.C. 4905.26 "does not establish any particular duty to serve," and therefore "there can be no independent claim brought under Section 4905.26, Revised Code." *In Re Allianz US Global Risk Ins. Co. v. FirstEnergy Corp.*, Case No. 05-1011-EL-CSS, Entry ¶ 34 (Aug. 7, 2006). Based on the statutory text and precedent, R.C. 4905.26 is not a statute that can be "violated," as it does not impose an affirmative or independent duty on utilities.

Holding that AEP Ohio "violated" R.C. 4905.26 is like saying the Commission "violates" the appeal statute, R.C. 4903.13, when the Supreme Court reverses or vacates the Commission's order – as it did in *Wingo*. It is like concluding that a utility "violates" R.C. Chapter 4909 when the Commission orders new rates to replace the existing rates (the latter of which were, of course, previously approved by the Commission as being just and reasonable). Rather, the Commission was correct in the *Ihlendorf* case to conclude that R.C. 4905.26 is merely a procedural vehicle for raising concerns before the Commission, and the *Allianz* decision was correct in concluding that the complaint case statute creates no independent claim.

The complaint case statute, R.C. 4905.26, provides:

> Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice

> shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

Ohio Rev. Code Ann. 4905.26. Simply put, the statute broadly conveys jurisdiction over claims arising under R.C. Title 49 – some of which may involve violations by a public utility and some of which do not involve any violation; the statute simply requires the Commission to provide notice and hearing if the claim states reasonable grounds based on legal or regulatory obligations that are created outside of R.C. 4905.26.

The complaint case statute itself cannot be violated because it does not create a substantive regulatory obligation or independent statutory compliance obligation on a public utility. Rather, the procedural complaint case statute merely references regulatory and legal obligations that exist elsewhere in R.C. Title 49. Thus, although the scope of jurisdiction under this statute broadly encompasses almost any type of Title 49-related claim by or against a public utility, this statute is a procedural vehicle and does not convey unbridled Commission jurisdiction to find a utility "violation" for any policy or practice that the Commission retrospectively disagrees with. Rather than granting jurisdiction to make a separate finding that a utility "violated" R.C. 4905.26 as was done in Paragraph 262, the General Assembly has provided a very different design by conveying jurisdiction to remedy complaints that are found to have merit – based on regulatory and legal obligations that arise elsewhere in R.C. Title 49 (*i.e.*, outside of the complaint case statute).

It is elemental that the Commission is a creature of statute and has only those powers given to it by statute. *See e.g. Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537 (1993); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166 (1981); *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302, 307 , 414 N.E.2d 1051 (1980); *Ohio Bell Telephone Co. v. Pub. Util. Comm.*, 17 Ohio St.2d 45, 47 (1969).

The statutory design created by the General Assembly for following up the procedural vehicle of the complaint case statute is through enactment of a corollary statute that creates a substantive regulatory or legal obligation that can be violated (or a regulation or Commission order based on an obligation created outside of R.C. 4905.26). As referenced in detail below, such statutes are numerous in R.C. Title 49 and some of them were relied upon in this case by NEP in advancing its counterclaims. But Paragraph 262 of the Opinion and Order conflicts with this statutory scheme because the Commission – retrospectively and without a reasonable basis – found AEP Ohio "violated" the complaint case statute itself, R.C. 4905.26. The Commission's unlawful approach here is especially unreasonable given that no underlying violation of a statute, tariff, regulation, or Commission order exists according to the explicit findings of the Opinion and Order. In reality, the General Assembly created an integrated and deliberate design where the multiple bases for substantive violations are referenced throughout R.C. Title 49 (outside of R.C. 4905.26) can be adjudicated through the procedural complaint case statute – without either the need for, or the possibility of, a violation of the complaint case statute itself.

The complaint case statute and corollary provisions unequivocally contemplate and authorize the Commission to fashion a remedy *with or without* any underlying violation by a public utility. Ordering a new rate, tariff, or regulation is a common outcome of a complaint case. As will be shown, the Commission could certainly have implemented a reasonable and lawful tariff directive as an outcome under the complaint case statute in order to address consumer harms without any need to find that AEP Ohio violated anything at all. Frankly, issuance of guidelines to be applied on a case-by-case basis was always the approach taken by the Commission in the past when it addressed submetering practices in establishing the *Modified Shroyer* test and prior guidelines addressing submetering practices. Because the *Shroyer* and

Modified Shroyer tests have always involved a case-by-case inquiry, it is illogical and unfair to conclude that a utility violated any statutory duty by not recognizing an uncertain outcome of such a legal dispute. But more to the point here, the Commission erred when it unlawfully and unreasonably found that AEP Ohio violated the complaint case statute itself.

In this case, the most pertinent corollary remedial statute to the complaint case statute is R.C. 4905.37. Although AEP Ohio separately challenges the specific tariff directive adopted in this case (as discussed below), this statute does support a lawful and reasonable tariff directive after conducting a hearing under the complaint case statute. That statute provides:

> Whenever the public utilities commission is of the opinion, after hearing had upon complaint or upon its own initiative or complaint, served as provided in section 4905.26 of the Revised Code, that the rules, regulations, measurements, or practices of any public utility with respect to its public service are unjust or unreasonable, or that the equipment or service of such public utility is inadequate, inefficient, improper, insufficient, or cannot be obtained, or that a telephone company refuses to extend its lines to serve inhabitants within the telephone company operating area, the commission shall determine the regulations, practices, and service to be installed, observed, used, and rendered, and shall fix and prescribe them by order to be served upon the public utility.

R.C. 4905.37. Thus, under R.C. 4905.37, the Commission has authority to make necessary changes and prescribe them by order if it finds, after a hearing held upon complaint under R.C. 4905.26, that the practices of the public utility are unjust or unreasonable. *Norman v. Pub. Util. Comm*., 62 Ohio St.2d 345, 350 (1980).

Under R.C. 4905.37, the Commission can simply "determine the regulations, practices, and service to be installed, observed, used, and rendered, and shall fix and prescribe them by order to be served upon the public utility." R.C. 4905.37. There is no need – nor is it reasonable – to establish an underlying violation by a public utility as a predicate to adopting a remedy under R.C. 4905.37; more importantly, there certainly is no contemplation of any underlying violation being of the complaint case statute itself. Similarly, R.C. 4905.38 provides specific

Commission jurisdiction to order utility repairs, improvements, or additions when the Commission is of the opinion that those actions "should reasonably be made" *after* conducting a hearing under R.C. 4905.26. Nowhere in these statutes does the General Assembly contemplate or authorize the Commission finding that a utility violated the complaint case statute. In short, there is no basis to conclude that the General Assembly contemplated or authorized the potential for a finding of a utility "violation" of the complaint case statute that retrospectively creates a regulatory obligation or liability without an underlying breach of an established standard of conduct under a statute, tariff, regulation, or prior Commission order.

As referenced above, there are *numerous* other similar statutes in R.C Title 49 that consistently reinforce this deliberate design by the General Assembly. *See, e.g.*, R.C. 4905.73 (the Commission has jurisdiction to fashion any of the specified remedies upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4905.72); R.C. 4928.36 (the Commission has jurisdiction to fashion specified remedies upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4928.33); R.C. 4929.04(F) (the Commission has jurisdiction to fashion specified remedies upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4929.04(E) or a separation plan or code of conduct prescribed under the provision); R.C. 4911.19 (the Commission may find in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4911.19 without further evidence if the utility fails to comply with the obligation imposed by that statute); R.C. 4928.18(B) (the Commission has jurisdiction to fashion remedies specified in R.C. 4928.18(C) upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated R.C. 4928.17); R.C. 4929.041(F) (the Commission has continuing jurisdiction to enforce conditions adopted in granting a regulatory exemption under this provision and modify

the conditions in a complaint proceeding under R.C. 4905.26 if service quality is adversely affected); R.C. 4929.04(F) (the Commission has jurisdiction to fashion remedies specified upon finding in a complaint proceeding under R.C. 4905.26 that a public utility violated a separation plan or code of conduct prescribed under the provision); R.C. 4939.06 (the Commission has jurisdiction to order a just and reasonable public way fee upon finding in a complaint proceeding under R.C. 4905.26 that a public way fee adopted by a municipal corporation is unreasonable, unjust or unlawful).

All of these statutes that are corollary to R.C. 4905.26 contemplate applying substantive regulatory and legal obligations that arise from statutory provisions outside of the complaint case statute (and potential violations of those obligations) when adjudicating a claim under the complaint case statute. By contrast, neither R.C. 4905.26 nor any of the statutes in Title 49 that cross-reference R.C. 4905.26 contemplate a violation of the complaint case statute itself. Indeed, no statute in R.C. Title 49 contemplates a violation of R.C. 4905.26.

In sum, it was unreasonable and unlawful for the Commission to find in Paragraph 262 that AEP Ohio violated the complaint case statute – even if the Commission characterized the finding "as narrow and limited."

B. It Is Unreasonable to Fault AEP Ohio for Its Actions Following the *Wingo* Complaint Dismissal Because AEP Ohio Faced an Uncertain Legal Issue with No Guidance from the Commission, and AEP Ohio Acted in Good Faith and Simultaneously Brought the Issue to the Commission for Decision.

Section 18 of the Terms and Conditions of AEP Ohio's tariffs have a mirroring effect of only permitting resale activities that are permitted by Ohio law – the tariff provision does not authorize NEP or a landlord to undertake unlawful resale. In addition to the language of Section 18, Section 26 of the Company's Terms and Conditions allowed AEP Ohio to refuse service if a nonresidential customer is doing something unlawful. (NEP Ex. 4 at 9; NEP Ex. 5 at 9; Tr. I at

146.) As AEP Ohio witness Mayhan testified, there is nothing in AEP Ohio's tariff that permits unlawful activity. (Tr. I at 145.) Section 26 supports AEP Ohio's view that unlawful resale is prohibited under the tariff and is a basis to deny NEP's requested conversions. NEP witness Centolella also admitted that under either the old version or current version of Section 18 of AEP Ohio's tariffs, the Company is not required to provide service if it would violate Ohio law. (Tr. V at 965.) After all, as NEP witness Ringenbach also conceded, Ohio law governs if there is a conflict with a filed tariff. (Tr. VI at 1123-24.) And as Commissioner Conway emphatically observed, the facts in this case are "novel and unprecedented" and do not "remotely resemble" the facts presented in prior submetering cases. Opinion and Order, Separate Opinion of Commissioner Conway ¶ 3-4. In reality, after dismissal of the *Wingo* complaint on remand and the lack of a Commission investigation or rulemaking, AEP Ohio was forced to decide how to interpret the "unlawful resale" provision of its tariff. The Commission's previous guidance, the "modified *Shroyer* test," had been eliminated by the Court, and the Commission had provided no replacement test or any other guidance. This situation necessarily demanded that AEP Ohio freshly scrutinize the factual and legal analysis of NEP's request, which AEP Ohio's legal counsel communicated to NEP the day after the *Wingo* decision was issued. (NEP Ex. 89, Ringenbach Direct, Ex. K.)

Significantly, the Opinion and Order itself affirmatively and repeatedly sanctions the same conduct that Paragraph 262 refers to as an unlawful policy change, thus directly severely undercutting the Paragraph 262 finding. Specifically, in rejecting NEP's counterclaims, the Commission repeatedly made significant factual findings: (i) that no underlying violation of an existing legal or regulatory obligation occurred, and (ii) that AEP Ohio's decision to pause the conversions while this case was litigated was reasonable:

- AEP Ohio's actions pertaining to the Apartment Complexes resulting from this open question do not rise to a level sufficient for us to determine it violated R.C. 4905.26 and 4905.35, as alleged by NEP. (Opinion and Order ¶ 88 n.2.)

- While the Stay Entry is evidence that the Commission found AEP Ohio's decision to abruptly deny the conversion requests at the Apartment Complexes to be rash, the Commission does not believe that it was unlawful or unreasonable for AEP Ohio to pause such conversions while awaiting a decision in the remanded *Wingo* case or for other Commission guidance. (Opinion and Order ¶ 256.)

- It was not an unreasonable decision to pause new conversion requests such as NEP's at the Apartment Complexes, while believing that older, already-approved requests such as at Bantry Bay and Ponderosa Village should not be halted. (Opinion and Order ¶ 278.)

- As outlined above, it was not illogical for the Company to have concerns that converting the Apartment Complexes could result in violations of its own tariff. AEP Ohio limited the scope of the conversions it would resist until it gained clarity from the Commission via this Complaint. (Opinion and Order ¶ 281.)

- As reiterated throughout these conclusions, the Commission agrees with AEP Ohio that, given the circumstances, it was not unreasonable to oppose third-party submetering while it sought a determination from the Commission in the wake of the *Wingo* remand. (Opinion and Order ¶ 287.) This conclusion was based on the principle discussed in *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 207 (1994), that discrimination is not prohibited *per se* but is only if without a reasonable basis.

- Commissioner Conway in his separate opinion also emphatically observed that "none of the fact patterns that underlaid any of the precedents … remotely resembled the highly sophisticated and large-scale third-party model that NEP has deployed in Ohio through its contracts with the Apartment Complexes' landlords. (Opinion and Order, Separate Opinion of Commissioner Conway ¶ 3; *see also id.* ¶¶ 8-9 (the novel and unprecedented facts of this case substantially alter the inquiry by rendering the first two prongs of *Shroyer* essentially irrelevant and without much meaning).)

Each and every one of these record-based substantive findings severely undercut Paragraph 262's conclusion that AEP Ohio violated the complaint case statute by adopting a policy to deny conversion requests by property owners that utilize third-party submetering companies. In conflict with the Paragraph 262 finding, these findings confirm that: (i) there is no underlying standard-of-conduct violation that would support granting relief under the complaint case statute,

and (ii) AEP Ohio's "policy" of pausing large scale, third-party conversion requests during the pendency of this case was reasonable.

Either decision AEP Ohio could have made after the *Wingo* remand and dismissal – to either unilaterally abandon its customers to NEP or deny the conversion – was problematic. AEP Ohio took the actions it did in an attempt to preserve the *status quo* for adjudication and to get guidance from the Commission. If AEP Ohio had gone ahead with the conversion, the Commission would likely have had no opportunity to address the submetering legal issues absent a complaint being filed by a tenant. In any case, the Commission would presumably decline to rule as it did after it issued a "stay" ordering AEP Ohio to complete the conversions during the complaint case only to unfairly find the issue "moot" in its Opinion and Order. Opinion and Order ¶ 231. The "damned if you do and damned if you don't" situation forced AEP Ohio to proactively present the issues to the Commission through a complaint case filing – the same remedy the Opinion and Order repeatedly endorses as the correct procedural path. *See* Opinion and Order ¶ 262 (filing a complaint case is the appropriate recourse); *id.* ¶ 299 (AEP Ohio's complaint had reasonable grounds and was a "viable, lawful option"); *id.* ¶ 302 (filing a complaint was the "appropriate recourse"). Because there was no previous finding that NEP's large scale third party submetering practices were lawful, AEP Ohio acted in good faith and did not violate any established standard. Indeed, the Supreme Court remanded that very issue for the Commission, and the Commission dismissed the *Wingo* remand without a determination on that issue. As referenced by the numerous findings in the Opinion and Order and Commissioner Conway's separate opinion, this was an unprecedented situation and the Company's interpretation of its tariff under the circumstances presented as prohibiting large-scale third-party submetering was reasonable.

In further support of its Paragraph 262 finding of a complaint case statute violation, the Commission cites two of its own decisions in two complaint cases involving CEI as precedent where it admonished parties' after-the-fact attempts to justify denial of consumer requests. Ultimately, citing to the Commission's prior case decisions that were not challenged on rehearing or appeal does not establish any binding legal precedent that AEP Ohio should have known about or followed. But even assuming *arguendo* that the decisions are lawful and reasonable, they do not support Paragraph 262's finding of a violation of the complaint case statute here.

As a threshold matter, in the same paragraph, the Opinion and Order characterizes AEP Ohio's policy as an intentional "blanket denial policy" that was implemented "in the midst of this dispute," on the one hand, and yet as an after-the-fact justification, on the other hand. Separately, it is counterfactual to characterize AEP Ohio's denial of NEP's conversion requests as an after-the-fact justification – the denial was issued and explained in writing contemporaneous to AEP Ohio proactively filing the complaint to initiate this case. And of course, the Commission ultimately found in multiple places in the Opinion and Order that the pausing of third-party conversions was fact-based and reasonable. *See e.g.*, Opinion and Order ¶¶ 256, 278, 281, 287.

Moreover, the two CEI cases referenced in Paragraph 262 as examples of retrospective admonition are distinguished in several respects. In *Cleveland Metropolitan School District v. Cleveland Electric Illuminating Company*, 18-1815-EL-CSS (*CMSD* Case), in stark contrast to the case at bar, the Commission characterized the dispute as a pricing dispute under a tariff that neither party disputes the customer was eligible to take service. *CMSD*, Opinion and Order ¶ 85. The Commission also found in the *CMSD* Case that the tariff provision involved was unambiguous. *Id*. ¶ 94. In the instant case, by contrast, the dispute goes far beyond pricing and the tariff prohibits "unlawful resale" which is necessarily not a self-executing provision or

unambiguous. In finding in favor of the Complainant on one count in the *CMSD* Case, the Commission concluded that CEI's decision requiring the customer to pay 100% of the costs "was unjust and unreasonable, pursuant to R.C. 4905.22 and R.C. 4905.26," and used the same phrase at the end of the order in its findings of fact and conclusions of law. *Id*. ¶¶ 105, 115. Thus, the Commission did not make a separate or disconnected finding that the utility violated R.C. 4905.26 but only found that billing the customer full costs "was unjust and unreasonable" and could collectively be remedied "pursuant to R.C. 4905.22 and R.C. 4905.26." Admonishing parties for after-the-fact justifications is one thing – as was done in the *CMSD* Case – but finding that a utility violated the complaint case statute without any underlying violation of a statute, rule, or order is quite another; for this important reason, Paragraph 262's reliance on the *CMSD* Case is misplaced and does not support the statutory violation finding.

The second CEI complaint case cited in Paragraph 262 is *Schumann v. Cleveland Electric Illuminating Company*, 17-473-EL-CSS (*Schumann* Case), where the Commission simply found that CEI's denial of service under an unambiguous tariff was unjust and unreasonable. *Schuman* Case, Opinion and Order ¶¶ 50, 62. The *Schumann* decision did not make any findings of a statutory violation, let alone a violation of the complaint case statute. Even leaving aside the fact that neither the *CMSD* Case nor *Schumann* Case was subjected to rehearing or appeal, the Opinion and Order's apparent reliance on the Commission's own untested precedent fails to offer any support for Paragraph 262's finding that AEP Ohio violated the complaint case statute.

It is also counterfactual for the Commission in Paragraph 262 to conclude that the violation occurred "at the very least to the extent it applies to NEP." No impact or harm of the policy was applied to NEP in light of the interim relief granted in the Stay Entry and the Company's completion of the conversions before the merit decision. Until the Opinion and

Order was issued and only after the "intense and in depth review" as referenced in Paragraph 262, was any determination made that large-scale third-party submetering was lawful in light of the *Wingo* remand. Moreover, according to the Commission, the master meter tariff relied upon by the Commission applies to the landlord as the customer, not a third-party "agent." Opinion and Order ¶¶ 184, 194. Thus, the tariff was not applied to NEP according to the Opinion and Order and there was no application of the policy to NEP due to the Stay Entry. In those respects, the violation finding in Paragraph 262 is unreasonable, against the manifest weight of the record and conflicts with other explicit findings contained in the Opinion and Order.

Later in Paragraph 262, the Commission also states after again affirming that the conversion pause was reasonable that "there was no doubt the [NEP] conversion request was the catalyst that initiated the policy change." In reality, the record shows that there were other NEP conversion requests before the Five Apartments and there were other NEP requests after the Five Apartments – so it is not the case that the NEP requests were the true catalyst. Opinion and Order ¶¶ 278 (Bantry Bay and Ponderosa Village were processed before the *Wingo* decision and were not discriminatory); *id.* ¶ 311 (Northtowne conversion request was submitted after the complaint was filed). And the manifest weight of the evidence confirms that the *Wingo* remand decision is the real catalyst for the Company's denial, as was explained many times in the record and acknowledged elsewhere in the Opinion and Order. *See, e.g.*, Opinion and Order ¶ 256 (not unreasonable for AEP Ohio to pause conversions while awaiting a Commission decision after *Wingo* remand because that decision created uncertainty as to NEP's status as a public utility); *id.* ¶ 282 (AEP Ohio was equally focused on AP&L properties and other submetering companies and there was no evidence of AEP Ohio discriminating specifically against NEP); *id.* ¶ 287 (AEP Ohio treated all submetering companies the same in the wake of the *Wingo* remand and NEP was

not singled out or targeted). In any case, the import of this diffuse observation is unclear, and it does not incrementally explain or justify anything additional to support the violation finding.

Finally in Paragraph 262, the Commission states that it is ironic that the policy change was imposed "in the midst of this dispute" and vaguely observed that it "seems to run contrary to AEP Ohio's desire to wait for further Commission guidance on this issue." There are several flaws in this finding and, again, the Commission does not explain how the (flawed) observation even supports any statutory violation. AEP Ohio never communicated that it wanted to wait on a Commission ruling before taking any action – it is more accurate to say that the Company needed to preserve the *status quo* for existing AEP Ohio customers that were the subject of potential conversion requests for a Commission determination and actively sought such a determination before it would become moot. AEP Ohio was very clear about its opposition to the Stay Entry and reasons for bringing the complaint. AEP Ohio Memorandum Contra NEP's Motion for a Stay at 3-4 (Dec. 17, 2021) (AEP Ohio's approach was intended to preserve the *status quo* for existing customers by denying third-party submetering conversion requests while simultaneously challenging the legality of such conversion requests through the proactive filing of the Complaint). Absent the Company's denial of the service requests based on a good faith application of its Commission-approved tariff prohibiting unlawful resale, the matter would not have been addressed by the Commission because either the dispute would not exist or it would be moot without AEP Ohio's policy stance. Opinion and Order ¶ 231. So it is unreasonable and counter-factual for Paragraph 262 to suggest that AEP Ohio has a desire to wait that ran counter to taking actions to preserve the issue for decision.

C. The Commission Denied AEP Ohio Its Right to Due Process of Law by Finding that AEP Ohio "Violated" a Rule That Did Not Exist at the Time.

As discussed above, R.C. 4905.26 does not impose any substantive rules that a public utility can "violate." It is simply a procedural statute. For example, R.C. 4905.26 does not prohibit "unjustly discriminatory" practices "relating to any service furnished by the public utility"; it states that a complaint alleging that a public utility has engaged in "unjustly discriminatory" practices should be set for hearing "if it appears that reasonable grounds for complaint are stated." R.C. 4905.26. Similarly, the statute does not prohibit "unreasonable" practices "relating to any service furnished by the public utility"; it says that complaints alleging that a public utility's practices are "unreasonable" should be set for hearing "if it appears that reasonable grounds for complaint are stated." Thus, it is incorrect to hold, as the Commission did (*see* Opinion and Order ¶ 262), that AEP Ohio's policy for converting existing complexes to master-meter service "violates R.C. 4905.26" because the Commission concluded that policy was "unfounded and unreasonable." Even if AEP Ohio's policy was "unfounded and unreasonable," which AEP Ohio contests, adopting that policy cannot have violated a statute that does not, *itself*, prohibit unfounded or unreasonable policies.

Holding that R.C. 4905.26 *independently* imposes a "reasonableness" standard, and that AEP Ohio's policy violated that standard, would render the statute unconstitutionally vague. "The void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also City of Norwood v. Horney*, 2006-Ohio-3799, ¶¶ 86-87 (a civil statute that "substantially affects … fundamental constitutional rights" is "void for

vagueness" if it does not "afford[ ] a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law"). A statute that simply prohibited any public utility practice that the Commission found "unreasonable," without enumerating any factors against which to judge the reasonableness of the practice, would almost certainly be void for vagueness if the statutory scheme imposed penalties for "unreasonableness." *Compare State v. Carrick*, 2012-Ohio-608, ¶ 20 (holding that a statute that prohibited "unreasonable" noise was not "unconstitutionally vague" because it "enumerate[d] specific factors … with which to judge the level of the disturbance"). Allowing the Commission to penalize the public utility for an "unreasonable" practice without showing that the public utility knew (or should have known) the action was unreasonable would raise additional constitutional concerns. *See id.*¶ 21 (noting that the noise statute in question there "require[d] a culpable mental state of recklessness").

Similarly, in the absence of an established standard based in a statute, lawful rule, or Commission order, it is unreasonable and unlawful to form a statutory violation based purely on retroactively disagreeing with the Company's good faith actions in attempting to apply its Commission-approved tariff. A utility is constantly required to interpret and apply its tariffs, and it cannot reasonably be considered a statutory violation to do so. Doing so is akin to unlawful retroactive ratemaking. As the Commission well knows, a central tenet of R.C. Title 49 prohibits retroactive ratemaking. *Keco v. Cincinnati & S. Bell Tel. Co.*, 166 Ohio St. 281, 256-57 (1957); *In re Application of Columbus S. Power*, 2014-Ohio-462, ¶ 49; *In re Columbus S. Power*, 2011-Ohio-1788, ¶ 16; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2009-Ohio-604, ¶ 21, *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 2004-Ohio-4774, ¶ 27; *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997); *Office of*

Consumers' Counsel v. Pub. Util. Comm., 61 Ohio St.3d 396, 409 (1991). That principle is based on the fact that ratemaking is a quasi-legislative function and cannot be exercised retroactively. Under the same principle, it would also be unlawful for the Commission to make retroactive changes to tariffs and regulations. The Company's tariff – approved by the Commission as just and reasonable in the Company's last base distribution rate case, Case No. 20-585-EL-AIR – prohibits unlawful resale.

Exposing AEP Ohio to treble damages for an action that the Commission had not previously found to be unlawful creates additional constitutional concerns. Section 4905.61 of the Ohio Revised Code states:

> If any public utility … does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, or declared to be unlawful, … or by order of the public utilities commission, such public utility … is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation … .

R.C. 4905.61. Under that statute, a party may file suit for treble damages against a public utility after a "determination by the Public Utilities Commission that the utility violated a *designated* public utilities statute or commission order." *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 2007-Ohio-2203, ¶ 21 (citations omitted; emphasis added). Thus, the Commission's after-the-fact admonition and retrospective finding that AEP Ohio's policy "violated R.C. 4905.26" may allow NEP to pursue treble damages in state court (but only if, of course, NEP could demonstrate that the policy injured it).

That would be fundamentally unfair. As the Supreme Court of Ohio has recognized, "R.C. 4905.61 is a penalty statute." *Id.* ¶ 1. It "was designed to deter public utilities from committing regulatory violations and to punish them for failing to comply with the provisions set forth in R.C. Chapter 49." *Id.* ¶ 20. That is why "[b]ringing suit for treble damages against a

utility … is dependent upon a finding that there was a violation of a *specific statute* … or an order of the commission." *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 194 (1978). AEP Ohio simply had no way of knowing the Commission would reach its after-the-fact admonition based on the case-by-case approach always used in the past to address submetering issues.

Finally in this regard, the Ohio General Assembly imposed an analogous requirement on actions for treble damages under the Ohio Consumer Sales Practices Act. The Consumer Sales Practices Act (CSPA) states that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.02(A). If a supplier violates this statute, a consumer may bring suit to recover his damages. R.C. 1345.09(A). Treble damages (up to $200) are only available if the Ohio Attorney General had previously declared that specific "act or practice to be deceptive or unconscionable by rule[,]" or if a court had previously determined that the specific act or practice violates the CSPA and the Ohio Attorney General had posted that court decision in the "Public Inspection File." R.C. 1345.09(B).

Under both statutes – R.C. 4905.61 and the CSPA – fair notice of the law's requirement is a necessary predicate to treble damages. And that makes sense from a policy perspective. Penalties cannot deter an action that no public utility *knows* is a regulatory violation. And penalizing a public utility for an action that the Commission has only just determined to *be* a violation would be fundamentally unjust. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996) (overturning an excessive punitive damages award).

Here, nothing in R.C. Chapter 49, or the Commission's regulations, explicitly prohibits an electric distribution utility from adopting a policy of not converting existing apartments to master-meter service if they utilize third-party submetering companies like NEP. The Commission's opinion in this case is the first time the Commission has determined that such a policy is unreasonable. AEP Ohio could not have known that its policy would be found unlawful and had good reason to believe that the policy was, in fact, fully in line with the *Wingo* decision. *See* Opinion and Order ¶ 256 ("there was a genuine outstanding question as to whether NEP would be deemed to be operating as a public utility at the Apartment Complexes"). Finding that AEP Ohio's policy nonetheless violated R.C. 4905.26, and exposing AEP Ohio to a suit for penalties under R.C. 4905.61, would be fundamentally unfair and a violation of due process.

D. A Finding that AEP Ohio "Violated" R.C. 4905.26 Is Not Necessary to Reach the Same Result in This Case Including the Decision to Direct Changes to AEP Ohio's Practices or Tariff.

Moreover, finding a violation of R.C. 4905.26 was an unnecessary predicate to the remedy that the Commission imposed. Unlike R.C. 4905.61, which rightly requires a Commission finding that a public utility violated a specific statute or order before an Ohio court may impose treble damages, the Commission does not need to find a violation of a public utility statute before it orders a public utility to modify its practices. It only needs to find that the policy was "unreasonable" under R.C. 4905.37 to order relief:

> Whenever the public utilities commission is of the opinion, after hearing had upon complaint ... , served as provided in section 4905.26 of the Revised Code, that the … practices of any public utility with respect to its public service are *unjust or unreasonable*, … the commission shall determine the … practices … to be … observed ... and shall fix and prescribe them by order to be served upon the public utility. After service of such order such public utility and all of its officers, agents, and official employees shall obey such order and do everything necessary or proper to carry it into effect.

R.C. 4905.37 (emphasis added). The Commission has, in fact, taken this approach numerous times in resolving complaint cases without a violation finding. *Donahey, Jr. v. Ameritech Ohio*, Case No. 94-1954-TP-CSS, Opinion and Order, 1996 Ohio PUC LEXIS 14 (Jan. 18, 1996) (finding, in a complaint regarding respondent's calling cards, that the complainant had not met its burden of proof, but nonetheless ordering the respondent to provide additional notices to cardholders on the back of the calling cards). Similarly, if AEP Ohio brought a self-complaint and asks the Commission to change its tariff or rates because they are unjust and unreasonable, and the Commission agrees, it is not as if AEP Ohio has "violated" R.C. 4905.26. More to the point here, the Commission has never made a finding that a utility violated R.C. 4905.26 without an underlying violation of a statute or order.

As discussed above, AEP Ohio contests the Commission's finding that AEP Ohio's master-meter conversion policy was "unfounded and unreasonable" (Opinion and Order ¶ 262) and believes that finding should be reversed. Nonetheless, that finding was a sufficient basis to order AEP Ohio to terminate its master-meter conversion policy under R.C. 4905.37. Taking the additional step of declaring AEP Ohio's policy to be a violation of a purely procedural complaint statute was unreasonable and unlawful. On rehearing, the Commission should withdraw or reverse its finding that AEP Ohio violated R.C. 4905.26 – especially since the complaint case statute violation was completely superfluous to the sole remedy adopted by the Opinion and Order in this case (the tariff directive).

II. *Second Ground for Rehearing:* The "Electric Reseller Tariff" Ordered by the Commission Is Unlawful Under the Commission's Own Interpretation of "Electric Light Company" Under R.C. 4905.03(C), Violates the Statutory Rulemaking Procedures in R.C. Chapter 106, and Results in an Unreasonable Tariff Paradigm.

Despite finding that it lacks jurisdiction to regulate NEP, the Commission attempts to implement protections for the unfortunate tenants that become submetered by their landlord or

third party. Specifically, the Commission orders AEP Ohio to file tariffs requiring that (1) a landlord's lease agreement contain a notice in all capital letters that the tenant agrees to have the landlord secure and resell electricity and that the customer will no longer be under the Commission's jurisdiction; (2) the landlord's resale of electricity is at an amount the same or lower than what a similarly situated SSO customer would pay; and (3) the landlord's disconnection of service to a tenant will follow the rules set forth in Ohio Adm. Code 4901:1-18 (collectively referred to as "Tariff Directive"). Opinion and Order ¶ 224. AEP Ohio applauds the Commission's acknowledgement of the protections that tenants lose when they are submetered by a landlord (under the judicially-established landlord-tenant exception) or by a large-scale third-party submetering company (under the Opinion and Order's jurisdictional conclusions) as well as the Commission's desire to protect that vulnerable population. But the solution of implementing a test nearly identical to what the Supreme Court of Ohio previously overturned and effectively implementing new master-metering rules without due process is unlawful and unreasonable.

Parties that will be impacted by this decision, including but not limited to AEP Ohio, were not given the requisite opportunity to be heard on these changes, which will result in discriminatory application of the Tariff Directive. This Solomon-like "split the baby" approach has also thrust AEP Ohio into an untenable position of having to police an immeasurable number of private entities (landlords/submetering companies) over which AEP Ohio retains no control and fails to solve for the jurisdictional conundrum of enforcing the Tariff Directive. For these reasons, the Commission's decision requiring AEP Ohio to implement the Tariff Directive is unreasonable and unlawful.

A. The Commission's Reinstatement of the "SSO Price Test" Through a Tariff Contravenes the Express Instructions of the Supreme Court's Remand Order in *Wingo*.

The last time the Commission made a determination related to the resale of public utility service, the Supreme Court of Ohio made it abundantly clear that comparing the price of resold service to the price of the standard service offer cannot be used by the Commission as the test of whether to exercise jurisdiction over submetering. *Wingo*, 2020-Ohio-5583, ¶ 24. Yet, the Commission has done exactly that by requiring AEP Ohio to implement a tariff that prohibits "resellers" from charging tenants more than "a similarly situated customer served by the applicable utility's standard service offer ("SSO Price Test")." Opinion and Order ¶ 224.

In *Wingo*, the Commission was faced with determining whether it had jurisdiction to rule on a complaint case brought against NEP (and others) for the resale of public utility services. Opinion and Order ¶ 4. While the Commission had previously employed the *Shroyer* test to determine whether it had jurisdiction over such matters, in the *Wingo* case, the Commission adopted two modifications to the *Shroyer* test ("modified *Shroyer* Test"):

> (1) creat[ing] a presumption . . . that a reseller is a public utility if it charges a customer more for utility services than the customer would pay 'the local public utility under the default service tariff for the equivalent usage on a total bill basis;'" and
>
> (2) a reseller can "rebut this presumption by showing that one of two safe harbors applies—either (1) the reseller is 'simply passing through its annual costs of providing a utility service charged by a local public utility" or (2) "the [r]eseller's annual charges for a utility service * * * do not exceed what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs.'"

Id. ¶¶ 12-13. Based upon the modified *Shroyer* Test, the Commission found that NEP was not a public utility. *Id.* ¶ 14.

In reversing the Commission's determination, the Supreme Court of Ohio found that "whether someone is 'harmed' isn't a jurisdictional question; it is a merits question that can be

answered ***only after*** it is determined that an activity falls within the PUCO's jurisdiction." *Wingo*, 2020-Ohio-5583, ¶ 23 (emphasis added). In so holding, the Court reminded the Commission that "defining the parameters of the PUCO's jurisdiction is up to the General Assembly, not the PUCO," and remanded the case back to the Commission "to determine whether it has jurisdiction based upon the jurisdictional statute, not the modified *Shroyer* test." *Id.* ¶¶ 24, 26.

Despite this direction, the Commission now disclaims jurisdiction over resellers while at the same time attempting to address harms of residential tenants that it found were not customers under the Commissions' jurisdiction. The Commission acknowledges the shocking loss of rights and protections that are afforded to residential customers of regulated utilities to ensure that they "receive adequate, safe, and reasonable electric service, as required by law." Opinion and Order ¶ 224. But in finding "that NEP is not a public utility and therefore not subject to our jurisdiction" the Commission was forced to also find that it "lack[ed] the power to directly regulate NEP's actions." *Id.* Astonishingly, however, the Commission goes on to require regulations through AEP Ohio's tariffs applicable to landlords and submetering companies engaged in reselling, including a requirement that "[t]he landlord's charges for resale of electricity to each tenant must be the same or lower than the total bill for a similarly situated customer served by the applicable utility's standard service offer." *Id.* Commissioner Conway, in offering his "alternative approach" to indirect regulation, would give NEP even more leeway by allowing them to markup the price 10% above what they pay to AEP Ohio when reselling to tenants. Opinion and Order, Separate Opinion of Commissioner Conway, ¶¶ 5, 7.

Tariffs, however, are terms and conditions of utility service that are enforceable by the utility, its customers, and the Commission. Therefore, under the Commission's ruling in this

case, so long as submetering companies (such as NEP) and landlords do not charge more than the SSO, they will be outside the Commission's reach. At this point, the logic already begins to break down because in the very same order the Commission already found that it lacked jurisdiction to regulate the actions of resellers like landlords and submetering companies. Moreover, if a landlord or submetering company does charge more than the SSO (and violates the tariffs that AEP Ohio has been ordered to establish) the landlord can presumably be brought before the Commission via a complaint case. That is exactly the jurisdictional paradigm the Supreme Court struck down in *Wingo*. This paradigm also contradicts the Supreme Court's direction that the Commission is only to weigh in on the merits of the amount that submetered customers pay after it has been determined that the activity falls within the PUCO's jurisdiction. But the Commission had already disclaimed jurisdiction over the resale of public utility service.

The Commission reasons that it has "authority to set reasonable terms and conditions on jurisdictional utilities providing master meter service so as to ensure that users of that service, such as landlords, are providing it to the ***ultimate end user*** in a manner which is safe and consistent with the public interest." Opinion and Oder ¶ 224 (citing *Brooks v. Toledo Edison Co.*, Case No. 94-1987-EL-ATA, Opinion and Order at 16 n.12 (May 8, 1996)). To support this decision the Commission points to "ample precedent where we have exercised our authority over public utilities' tariffs ***to ensure adequate consumer protections*** are included in such tariffs." Opinion and Order ¶ 225 (emphasis added). The precedents to which the Commission refers, however, are the gas choice protections from twenty-five years ago. In those cases, the Commission approved pilot programs (and the accompanying protections) whereby ***customers of the regulated natural gas utilities*** could choose their supplier of natural gas. But such analysis is inapposite and inconsistent with the Commission's finding in this matter that "the landlord of

each of the Apartment Complexes and not the tenant is the 'consumer.'" Opinion and Order ¶ 184. Therefore, it is plainly unreasonable and unlawful to order the SSO Price Test when the Commission had already disclaimed jurisdiction and found that the resellers, not tenants, are the consumers that fall under Commission protection.

B. By Ordering the "Electric Reseller Tariff," the Commission Expanded the Scope of Its Disconnection Rules (OAC 4901:1-18) and Enacted Other Rules of General Applicability Without Following the Statutory Rulemaking Procedures in R.C. Chapter 106.

Despite finding it had no jurisdiction, the Commission manufactured a solution to protect master-metered residential tenants by requiring AEP Ohio to issue tariffs that mandate certain language in master-metered lease agreements, implementing the SSO Price Test, and requiring the disconnection procedures of Ohio Adm. Code 4901:1-18. In doing so the Commission has improperly amended and expanded its rules and discriminatorily applied them without due process.

1. The Commission Did Not Provide Adequate Notice and Opportunity to Be Heard.

As ordered by the Commission, the Tariff Directive will apply generally to ***all*** master-metered tenants in AEP Ohio's service territory. This would include countless numbers of landlords and numerous submetering companies such as NEP, American Power and Light, and others. Our courts have long recognized that due process requires those parties that have the potential to be impacted by a government action are first provided notice and an opportunity to be heard. *In Re Thompkins*, 2007-Ohio 5238, ¶ 13. Yet, no third-party submetering entity or landlord had notice or an opportunity to be heard regarding these proposed changes as they were not parties to this action. But even those that were parties to this case – AEP Ohio and NEP – were deprived of their ability to be heard on the Tariff Directive.

Neither AEP Ohio nor NEP advocated for or otherwise commented on the Commission-created Tariff Directive, which did not first arise until the Commission's Opinion and Order. It comes as no surprise, therefore, that the record is devoid of any evidence to support that the proposed "solution" (in the form of the Tariff Directive) will actually protect master-metered tenants or is possible for AEP Ohio and/or landlords/submetering companies to enact. The record did establish, however, that NEP was not affording many of these protections to the five apartment complexes at issue here. (AEP Ohio Ex. 1C, Lesser Direct, at 53-54 (loss of metering/billing rights); *id.* at 55-61 (loss of rate protections and shopping rights); *id.* at 70-73 (loss of payment plan rights and PIPP protections); *id.* at 79-82 (loss of disconnection protections)). Therefore, it stands to reason that landlords and submetering companies will be substantially impacted by these changes. It was unreasonable and unlawful for the Commission to require such tariff changes without first providing those impacted parties adequate notice and opportunity to be heard.

2. The Commission Discriminatorily Ordered Protections for Certain, but Not All, Tenants in the State of Ohio.

The Commission unreasonably and unlawfully ordered significant changes to AEP Ohio's tariffs that will discriminatorily impact landlords, submetering companies, and residential tenants of the state. Because this was a finite case involving AEP Ohio, the Commission has naturally only ordered that ***AEP Ohio*** amend its tariffs to afford tenants certain protections. Opinion and Order ¶ 224. As such, the Tariff Directive will only be applied to landlords and submetering companies that do business in the AEP Ohio service territory. It is a matter of public record that submetering companies including NEP are operating in other EDU territories. *See generally Duke Energy Ohio, Inc. v. Nationwide Energy Partners, LLC*, Case No. 22-279-EL-CSS,

Complaint (Mar. 30, 2022). Thus, only those tenants in the AEP Ohio service territory will be afforded the Tariff Directive at the exclusion of other tenants in other utility territories.

Putting aside the jurisdictional problem of requiring tariffs when the Commission held that it does not have jurisdiction over the resellers, there is no reason the Tariff Directive should only be applicable to one electric distribution utility. Overarching consumer protections, like the Tariff Directive is something that is better suited for the Commission's administrative rules so that they are applicable to all utility customers of the state. The very purpose of the administrative code provisions applicable to electric companies is to "to promote ***safe and reliable service to consumers*** and the public, and to provide minimum standards for ***uniform and reasonable practices***." OAC 4901:1-10-02(A)(2) (emphasis added). Protections such as the minimum customer service levels (4901:1-10-09), customer rights and obligations (4901:1-10-10), and disconnection rules (4901:1-10-18) are just a few of the protections that are afforded ***uniformly*** to all customers of the state.

The Tariff Directive is equivalent customer protections and even invokes some of those very rules. The Commission even acknowledges that "[t]he record of this case demonstrates clear need for ***reasonable terms and conditions*** on the resale of public utility service" (Opinion and Order ¶ 224 (emphasis added)), not just in the AEP Ohio service territory. Yet, the Commission only ordered AEP Ohio to implement such tariffs. Such protections (and express amendments to existing rules) are more appropriate for a rule making proceeding where they can be assessed for reasonableness after all interested/impact parties have had an opportunity to be heard and the rules can be equally and ***uniformly*** applied across the state rather than just certain service territories. It is unreasonable and unlawful to apply the Tariff Directive discriminatorily to tenants that are subjected to resold electricity in the AEP Ohio service territory only.

3. The Commission Failed to Follow Mandatory Statutory Procedures Required to Amend the Administrative Rules.

Even if the Commission had jurisdiction to mandate the Tariff Directive, the Commission acted unlawfully and unreasonably when it failed to follow the robust statutory procedures that are required to amend its rules. As previously established, all three protections in the Tariff Directive are the functional equivalent of instituting new regulations, yet the Commission bypassed that process. Even if there is doubt that the lease notice and SSO Price Test are rule amendments (they are the functional equivalent), there is no doubt that the Commission is expressly amending 4901:1-18 by requiring that "landlord[s] must follow the same disconnect standards applicable to landlords under Ohio Adm. Code Chapter 4901:1-18" when "engaging in the disconnection of electric service to a tenant for nonpayment of charges related to electric usage." Opinion and Order ¶ 224. Ohio Adm. Code 4901:1-18-08 already contains disconnection provisions that are applicable to landlord-tenant circumstances, albeit abbreviated compared to what regulated utilities must afford to their residential customers under Ohio Adm. Code 4901:1-18-06.

Under the Commission's ruling in this case, however, the Commission nebulously obviates Ohio Adm. Code 4901:1-18-08 (without any specific textual amendments) in exchange for the regulated utility disconnection protections throughout the rest of the section (without clarity as to which of the seventeen sections are applicable). The following is an example of some of the protections that landlords and submetering companies would presumably be required to afford to residential customers in the AEP Ohio service territory that are not currently required for master-metered tenants:

- Personal notice on the day of disconnect (OAC 4901:1-18-06(A)(2))).
- Extended pay agreements (OAC 4901:1-18-06(A)(4)).

- Specific notification information such as the utility's toll-free number to contact about their account, a statement containing information about het PUCO call center, and the contact information for the Office of the Ohio Consumer's counsel (OAC 4901:1-18-06(A)(5)).

- Limitations on disconnection between the dates of November 1 through April 15 (OAC 4901:1-18-06(B)).

- Limitations on disconnection where there is a medical certification related to circumstances where it would be especially dangerous to the health of any consumer at the premises or operation of necessary medical or life-supporting equipment impossible or impractical (OAC 4901:1-18-06(C)).

While AEP Ohio agrees that regulated protections are paramount for residential customers, the Commission failed to make the necessary jurisdictional findings and likewise failed to follow the statutory processes required before an Ohio administrative rule may be changed. As an initial step, the Commission did not give public notice of any rule change or afford those impacted by a proposed rule a chance to comment. *See* R.C. 119.03; *see also Fairfield Cty. Bd. of Commrs. v. Nally*, 2015-Ohio-991, ¶ 36. The Supreme Court has acknowledged that "'[t]he rulemaking requirements set forth in R.C. Chapter 119 are designed to permit a full and fair analysis of the impact and validity of a proposed rule' before it is imposed upon the regulated community." *Nally*, 2015-Ohio-991, ¶ 36 (citing *Condee v. Lindley*, 12 Ohio St.3d 90, 465 N.E.2d 450 (1984)). Nor did the Commission perform a business impact analysis to determine if there will be any adverse impact on any businesses, which will likely be quite significant. *See* R.C. 121.82. And the Commission failed to provide the full text of the proposed rules to the joint committee on agency rule review ("JCARR") at least sixty-five days in advance of any implementation. *See* R.C. 106.02; R.C. 111.15(D). In fact, the Commission did not even provide AEP Ohio with the full text of the rules change, instead leaving AEP Ohio to independently figure out how the rule should be changed to align with the Opinion and Order. Finally, there is no indication that the Commission performed the requisite fiscal analysis for

submission to JCARR – failure to do so requires JCARR to reject the filing. R.C. 106.024(B) & (C); R.C. 111.15(D).

Failure to follow these procedures to implement the Tariff Directive was unreasonable and unlawful. AEP Ohio is harmed by this error since the Commission places the Company in the middle of its indirect regulation scheme. The Company is understandably resistant to being placed in a position of interpreting and applying the Commission's tariff provisions without guidance, being placed in the position of acquiring liability for retrospective determinations that the Commission disagrees with the Company's good faith efforts, and being saddled with the burden of litigating complaint cases at its own expense in order to address case-by-case issues that arise under the tariffs.

C. It Is Unlawful and Exceeds the Commission's Statutory Jurisdiction Under R.C. 4905.03(C) for the Commission to Conclude that NEP (and Landlords) Are Not "Electric Light Companies" and Yet Regulate Them Through AEP Ohio's Tariff's as if They Were.

Once the Commission (incorrectly) concluded that neither NEP nor landlords are "electric light companies" under R.C. 4905.03(C), or otherwise "public utilities," then the Commission ceased having any jurisdiction to regulate them. Yet the Tariff Directive does precisely that: it regulates NEP and landlords who submeter and resell electric service to tenants.

As discussed above, the Commission can adopt wide-ranging regulations governing "public utilities," such as the gas choice regulations discussed above. The Commission can adopt narrow tariff provisions that address the conduct of those who purchase electricity from AEP Ohio, but these are limited to issues such as ensuring customers do not create a safety hazard on AEP Ohio's system. The Commission's regulation of NEP and landlords through AEP Ohio's tariff, however, goes far beyond this. The Tariff Directive imposes "utility-like" regulations that govern *how much they may charge for electricity* or *how they may disconnect for*

nonpayment. This kind of authority can only be exercised if the Commission finds that an entity is an "electric light company" under R.C. 4905.03(C).

To demonstrate that the Commission's imposition of utility-like regulations through AEP Ohio's tariff is legally untenable, consider that it has no limiting principle and would lead to absurd consequences if logically extended. The Commission purports to assert authority to set "terms and conditions" in AEP Ohio's tariff to apply the entire set of disconnection regulations in OAC Chapter 4901:1-18 to NEP and landlords who disconnect submetered tenants for nonpayment. Opinion & Order ¶ 224. If this is legally permissible (it is not), may the Commission use AEP Ohio's tariff to extend *all* utility regulations in the Revised Code and Ohio Administrative Code to NEP and landlords who are engaging in "resale"? The Commission's Tariff Provisions require NEP or landlords to charge tenants no more than "the total bill for a similarly situated customer served by the applicable utility's standard service offer." *Id.* If this is legally permissible (it is not), may the Commission instead use AEP Ohio's tariff to require that NEP or landlords submit their rates for the Commission's approval, perhaps after a rate case under R.C. Chapter 49? May the Commission use AEP Ohio's tariff to outright *prohibit* submetering? These questions show that the Commission's legal basis for ordering the Tariff Provisions is flawed. If the Commission wants to protect submetered tenants, it must reach a lawful determination of jurisdiction by finding that NEP is an "electric light company" under R.C. 4905.03(C).

D. The "Electric Reseller Tariff" Is Unworkable for Several Reasons.

While the Commission appears to have tenants' interests at heart, the proposed Tariff Directive is unreasonable and unlawful because the provisions lack the requisite specificity for enactment and potentially leave AEP Ohio in an untenable position of enforcement without cost recovery. By finding that it did not have jurisdiction to address submetering by landlords, the

Commission was left with a problem but no solution. As a result, the Commission extemporaneously, without notice, discussion, or evidence, sought to solve the problem by requiring three specific changes to AEP Ohio's tariffs – the Tariff Directive. Sometimes the best intentions, however, can have dire consequences, as is the case here.

Certainly, the Commission was not tilting at windmills – it expects the tariffs to be actionable and enforceable – but there is no apparent mechanism by which to enforce the tariffs. Typically, utilities are charged with enforcing their own tariffs. Such a structure would be ironic and confounding – during the process of losing its relationship and obligations to existing residential customers to a third-party, AEP Ohio is then required to monitor, police, and regulate those very third-parties over which AEP Ohio has no control. It would be further unlawful and unreasonable to foist the burden and cost on AEP Ohio to regulate the conduct of third-party landlords and submetering companies.

In order to successfully police such a tariff, AEP Ohio would have to gain access, review, and analyze an immeasurable amount of information related to ***all master-metered tenants within the service territory***, including but not limited to the following components of agreements to which AEP Ohio is not a party: private lease agreements, each monthly billing between a third-party landlord and its tenants, disconnection procedures of each landlord/submetering company, and details of each disconnection performed by a reseller. Yet the Commission made no acknowledgement of the Herculean amount of additional effort and costs associated with such endeavors to enforce the proposed tariffs, let alone granting cost recovery. Such an unfunded mandate is unreasonable and unlawful and should not be enacted until and unless the Commission has established clear guidelines for AEP Ohio, including a cost recovery

mechanism, and some assurances against involuntary conscription to additional liability like the Opinion and Order imposes in Paragraph 262.

Alternatively, "any person, firm, corporation, or . . . the public utilities commission" can institute a complaint case pursuant to R.C. 4905.26 to enforce tariff. Complaint cases, however, are limited to filings "against any ***public utility***." R.C. 4905.26 (emphasis added). And the Tariff Directive does not protect against action by the AEP Ohio; they protect against actions of a third-party over which AEP Ohio has no control. Thus, filing a complaint against AEP Ohio would make little sense and have no enforceable resolution. Alternatively, if there is a violation, will the Commission accept complaints from tenants if a submetering company or a landlord violates the tariff? If so, what will be the source of the Commission's jurisdiction to field such complaints, when it has already found that landlords and submetering companies are not acting as utilities and it does not have jurisdiction over those entities?

Aside from lack of a clear path for enforcement, there are a myriad of other pragmatic problems and unanswerable questions (that could have potentially been rooted out and addressed had there been a rulemaking proceeding) that prevents clear implementation. First, it is unclear to whom the tariffs are to apply because the Commission never defines "resale," yet orders that the tariff modifications be applicable to any "resale of electric service from a landlord to a tenant." Opinion and Order ¶ 224. Will this apply to landlords that master meter but do not submeter with their own separate bill; instead, it is included in rent, or simply passed through with an administrative charge?

The lease notice requirement also appears to lack any sort of specificity that would render it anything other than a hollow and ineffective solution. Simply allowing landlords and submetering companies to skirt critical consumer protections by giving notice that they intend to

do so is hardly a protection. But how will AEP Ohio review and control the contracts of third-parties? Requiring a regulated utility to compel third parties to insert specific language (including specific font and typeface) into private unregulated lease agreements reflects how the Commission has reached beyond the jurisdiction established by Title 49.

It is also unclear how the SSO Price Test is to be conducted when it does not account for PIPP, budget billing, payment plans, and a host of other possible scenarios for a "similarly situated customer served by the applicable utility's standard service offer." *Id.* Moreover, the Commission has not established how the "total bill" will be calculated, which is an important detail for conducting the requisite comparison. Without such definition, a landlord or submetering company could easily evade the SSO price test through "community charges" and other bill line items. As the Commission has seen in dealing with a myriad of CRES Provider pricing schemes, it is no simple matter to compare the SSO price with other creative, complex pricing schemes. Indeed, the Commission must look no further than to a myriad of CRES pricing schemes such as the "fixed means fixed" investigation that followed the 2014 polar vortex where the Commission found the importance of "straightforward" language. *In the Matter of the Commission-Ordered Investigation of Marketing Practices in the Competitive Retail Electric Service Market*, Case No. 14-568-EL-COI, Finding and Order at 11-14 (Nov. 18, 2015). Conducting the SSO Price Test as set forth by the Commission will be anything but straightforward for AEP Ohio and the tenants the Commission desires to protect.

The Tariff Directive requirement to implement the disconnection rules set forth in Ohio Adm. Code 4901:1-18 is particularly vague and contradictory. Ohio Adm. Code 4901:1-18 contains seventeen separate rules comprised of forty-five pages of regulations related to termination of residential electric service. The Commission has not clarified which rules should

be applicable to the resale of electric service by landlords and submetering companies. This is particularly confusing because there is already a rule that governs termination of service in a master-metered scenario. Is it safe to assume that rule will no longer be applicable? To the extent the Commission desires the applicability of all rules under 4901:1-18, many of those would appear to be nonsensical in this context. For instance, five out of the seventeen rules govern the administration of the PIPP program, which can only legally be offered by a regulated utility such as AEP Ohio. *See* R.C. 4928.54 *et seq*. Should landlords and submetering companies be required to pay arrangements for customers that would otherwise qualify? *See* Ohio Adm. Code 4901:1-18-13. The disconnection rules also require notification information such as the utility's toll-free number to contact about their account, a statement containing information about the PUCO call center, and the contact information for the Office of the Ohio Consumer's counsel. *See* Ohio Adm. Code 4901:-18-06. Will the Commission's staff field calls and answer questions from submetered tenants? Certainly, it is unreasonable to refer customers to the Commission and the Consumer's Counsel when the Commission already found that they are not consumers over which there is jurisdiction pursuant to Title 49. Moreover, it is unreasonable to refer tenants to their local distribution utility when they have no such account – this is already an issue that AEP Ohio battles (*see* AEP Ohio Ex. 3 at 6-7)[1] and will only serve to cause more confusion for these tenants.

Finally, in asserting jurisdiction over resellers through AEP Ohio's tariffs (despite otherwise disclaiming jurisdiction), the Commission could also cause further jurisdictional confusion potentially depriving Ohio's residential tenants of legal rights to which they may

[1] AEP Ohio witness Williams testified that "AEP Ohio's call center has to field calls from customers that are confused about their electricity provider."

otherwise be entitled. The Supreme Court has long recognized that the "the PUCO has exclusive jurisdiction over most matters concerning public utilities." *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 2008-Ohio-3719, ¶ 5. In *Allstate*, the Supreme court adopted a two-part test to determine whether the Commission has exclusive jurisdiction: (1) whether the Commission's administrative expertise is required in resolving the dispute; and (2) whether the act constitutes a practice normally authorized by the utility. *Id.* at 12-13. The Supreme Court subsequently clarified that the two-prong determination requires a review of whether the substantive claims raise issues that are service-related. *Corrigan v. Illum. Co.*, 2009-Ohio-2524, ¶ 16.

The Tariff Directive appears to establish a paradigm where the Commission is providing certain protections through AEP Ohio's tariffed services and a practice that is normally authorized by the utility. This could be perceived as depriving a common pleas court of jurisdiction over these types of services. Indeed, less than a year ago the Tenth District Court of Appeals upheld a dismissal of a lawsuit brought by NEP on the basis that the trial court lacked jurisdiction over common law tort claims because the claims involved electric service-related inquiries. *Nationwide Energy Partners, LLC v. Ohio Power Company*, 2022-Ohio-4099, ¶¶ 16-22. Thus, the Tariff Directive could equally lead a common pleas court to determine that it lacks jurisdiction over tenant claims against resellers because such claims involve/overlap with utility tariffed service. Such a determination could deprive tenants of meaningful protections under other statutory protections such as the Consumer Sales Practices Act, which should otherwise be applicable to a non-regulated entity.

By disclaiming jurisdiction over the resale of electric service, the Commission divested itself of jurisdiction to impose any regulations on that industry. The Commission's attempt to protect tenants by resurrecting the SSO Price Test flies directly in the face of the *Wingo* decision

from just a few years ago. The Commission also abridged the due process protections afforded to those that are impacted by this decision, which will be discriminatorily applied. Imposing half-measures will only serve to further confuse jurisdiction, place tremendous burden on AEP Ohio, and potentially harm a number of unknown parties, including tenants, that were not afforded an opportunity to heard.

III. *Third Ground for Rehearing*: The Commission's Application of the Jurisdictional Statute, R.C. 4905.03(C), to NEP Is Legally and Factually Erroneous.

On AEP Ohio's claims, the Commission determined that NEP is not "engaged in the business of sup plying electricity or light, heat, or power purposes to consumers" under R.C. 4905.03(C) and therefore is not an "electric light company" or "public utility" subject to the Commission's jurisdiction. That conclusion was contrary to the plain meaning of the statutory text and based on an untenable reading of the factual record in this proceeding.

A. The Commission's Definition of "Consumer" in R.C. 4905.03(C) Is Contrary to That Term's Plain Meaning.

The Commission's first ground for holding that NEP is not "engaged in the business of supplying electricity or light, heat, or power purposes to consumers" under R.C. 4905.03(C) was that tenants are not "consumers." (Opinion & Order ¶ 184-197.) That interpretation of the statue was incorrect. Under the plain meaning of the words of the statute, submetered tenants must be "consumers."

Where, as here, "a term is not defined in the statute, we give the term its plain and ordinary meaning." *State v. Bertram*, 2023-Ohio-1456, ¶ 11. "In determining the ordinary meaning of the term," courts often "look to dictionary definitions." *State ex rel. Int'l Ass'n of Fire Fighters v. Sakacs*, 2023-Ohio-2976, ¶ 18; *City of Athens v. McClain*, 2020-Ohio-5146, ¶ 30. *Merriam-Webster Dictionary* defines "consumer" as "one that consumes, such as one that

utilizes economic goods."[2] *Merriam-Webster* provides five definitions of "consume," the most pertinent of which is "to utilize as a customer."[3] The *Oxford English Dictionary* defines "consumer" as "[a] person who uses up a commodity; a purchaser of goods or services, a customer."[4]

Applying the dictionary definitions of "consumer," there is no question that a submetered tenant is a "consumer" of electricity. Electric service is an "economic good," and the tenant "utilizes" and "uses up" this economic good in her apartment. She turns on her electric lights so she can see, uses her electric toaster or oven to cook food, and powers her electric tv to be entertained. The tenant also "utilizes" electric service as a "customer." *Merriam-Webster* defines "customer" as "one that purchases a commodity or service." The tenant's electric usage is metered by NEP, NEP sends her a bill, and she pays NEP based on how much electricity she has used. Thus, the tenant "purchases" every kilowatt-hour of electricity she utilizes in her apartment. The submetered tenant, therefore, is a "customer" who "utilizes" the economic good of electricity. Under the ordinary meaning of "consumer" as described in the dictionary, the submetered tenant is a "consumer" of electricity.

That the word "consumer" must be defined to include submetered tenants is confirmed by examining what changes – or, rather, what *does not* change – when a building is converted to submetering. On *Day One*, before conversion, a tenant uses electricity in her home to power her

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[2] https://www.merriam-webster.com/dictionary/consumer. *Merriam-Webster* also provides a second definition of "consumer" that is not pertinent here: "an organism requiring complex organic compounds for food which it obtains by preying on other organisms or by eating particles of organic matter."

[3] https://www.merriam-webster.com/dictionary/consume. The other four definitions all connote *using up* or *using all* of something – for example, "to spend wastefully," "to do away with completely," "use up," "to eat or drink especially in great quantity," or "to enjoy avidly." To apply these definitions here, it is the tenant who "uses up" the electricity. If the landlord were to "use it up," there would be nothing left to resell to the tenant.

[4] https://www.oed.com/search/dictionary/?scope=Entries&q=consumer.

lights, tv, dishwasher, hairdryer, etc., and the tenant pays AEP Ohio based on her electric usage. On *Day One*, therefore, the tenant must be a "consumer" as that term is defined in R.C. 4905.03(C), and AEP Ohio is "engaged in the business of supplying electricity" to the tenant as a "consumer" under that statute. No one disputes that AEP Ohio is a public utility on *Day One*, and the Commission indisputably has jurisdiction over the sale of electricity from AEP Ohio to the tenant/consumer. On *Day Two*, after the apartment building is converted to submetering, the tenant still uses electricity in her home in the exact same way as on *Day One*. She still turns on light switches, turns on her tv, uses her hairdryer, etc., and now the tenant pays NEP based on her electric usage. Nothing has changed about how the tenant *consumes* electricity. Applying the dictionary definition of "consumer" and "consume" described above, the tenant "utilizes the economic good" of electricity in the same way on *Day One* and *Day Two*. There is no basis, therefore, to apply the term "consumer" in R.C. 4905.03(C) differently on *Day One* and *Day Two*. The tenant must be a "consumer" under R.C. 4905.03(C) both before and after conversion to submetering. AEP Ohio made this *Day One* / *Day Two* argument in its post-hearing briefs (AEP Ohio Br. at 146-47; AEP Ohio Reply at 25), and the Commission did not address it.

Instead of focusing on the plain meaning of "consumer," the Commission relied on Ohio Supreme Court cases that applied the term "consumer" to *landlords*, but not tenants. Although these cases held that landlords are "consumers" in submetered buildings, not one of the cases addressed whether the tenants are ***also*** "consumers" in submetered buildings. For instance, paragraph 193 of the Opinion & Order focuses on one sentence from *Pledger v. Public Utilities Commission*, 2006-Ohio-2989, stating that there is no authority that "supports the assertion that in a landlord-tenant relationship, it is the tenant rather than the landlord who is the consumer of the commodity provided by a water-works utility." *Pledger*, 2006-Ohio-2989, ¶ 35. The

Commission takes this sentence to mean that a tenant cannot, in any circumstance, be a "consumer." (Opinion & Order ¶ 194.) But *Pledger* did not hold this. The only question in *Pledger* was whether the *landlord* was a consumer and, therefore, whether the Commission had jurisdiction to regulate the sale between a public utility such as AEP Ohio and the landlord's master meter. *Pledger* did not address a claim that the landlord was a "public utility," and of course *Pledger* did not address a third-party submetering company such as NEP at all. Therefore, *Pledger* did not address whether there are circumstances in which the tenant is ***also*** a "consumer" (*i.e.*, the landlord and tenant are both "consumers"), and any statements in that regard are merely *dicta*. *Cf.* Opinion & Order, Separate Opinion of Commissioner Conway ¶ 6 (recognizing there is a "point" at which "the landlord also is no longer the only 'consumer' in the master-meter/submetering arrangement; the tenant becomes a "consumer" also").

Moreover, the Commission's interpretation of *Pledger* and the other cases was incorrect because the Commission's interpretation cannot be reconciled with the Court's reasoning in *Wingo*, the most recent case to address submetering and the only case to address third-party submetering companies such as NEP. *Wingo* was aware of the *Pledger* decision, citing it numerous times and explaining its meaning over three paragraphs. *See Wingo*, 2020-Ohio-5583, ¶¶ 18-21. Yet if *Pledger* stands for the proposition that tenants are never "consumers," then NEP and other third-party submetering entities could *never* be "public utilities." Why didn't *Wingo* just say that? Why did *Wingo* remand the question of whether NEP is a "public utility" to the Commission with precise instructions "to apply R.C. 4905.03 and determine whether NEP is an 'electric light company' . . . "in the business of supplying" any of the covered services"? *Wingo*, 2020-Ohio-5583, ¶ 26. The only possible explanation is that *Pledger* did not foreclose a finding that tenants are "consumers"; in fact, it did not address that question at all. Put differently: Here

the Commission determined that in *Pledger* and all the other cases cited, the Court already held that "consumer" cannot mean a tenant in a submetered building. But the Court itself rejected that notion in its most recent decision, *Wingo*, by remanding the case to the Commission to develop a factual record and conduct a new interpretation of the jurisdictional statute, R.C. 4905.03(C), as it applies to NEP.

The same point about inconsistency applies to the Commission's previous investigation of submetering and the Commission's modified *Shroyer* test—those decisions would have been pointless (and obviously unlawful) if, as the Commission now asserts, *Pledger* held that submetered tenants can never be "consumers." That is, if *Pledger* held that submetered tenants are never "consumers," then the Commission's investigation would have been pointless because there was never any basis for the Commission to assert jurisdiction over NEP or any submetering practices. Indeed, NEP made that precise argument, and the Commission, citing *Pledger,* expressly rejected it:

> NEP contends that the Court has supplied the necessary interpretation of these statutes in the context of landlord submetering arrangements, in that the landlord is not in the business of supplying such utility services, *but is itself the consumer of such services supplied by the jurisdictional utility*.
>
> Rehearing on these assignments of error should be denied. As noted above, the statutory definitions in R.C. 4905.02 and 4905.03 are not self-applying to the landlord-tenant relationship. *Pledger*, 109 Ohio St.3d 463, 466. Therefore, the Commission *must weigh the facts and circumstances of each case*, and our consideration of whether any individual Reseller is a public utility must be made after the development of an evidentiary record in a complaint case.

Second Order on Rehearing ¶¶ 30-31, *In re Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI (June 21, 2017) (emphasis added). The Commission's holding here – that a submetered tenant is never a "consumer" – is an about-face from the Commission's reasoning in the submetering investigation. Instead of "weigh[ing] the facts and circumstances of each case" after "the development of an evidentiary record in a complaint

case," *id.* ¶ 31, the Commission here made a blanket legal ruling (tenants are not "consumers") that does not depend on the facts or the well-developed evidentiary record in this case (and is legally incorrect). There were no grounds for the Commission to reject its prior, correct approach of basing its decisions on the facts of each case. Indeed, the Commission's prior, correct approach was precisely what *Wingo* instructed the Commission to do when the Court stated that "application of the relevant legal standards to the facts is one that is best left to the PUCO in the first instance." *Wingo*, 2020-Ohio-5583, ¶ 26.

The Commission attempts to reconcile its interpretation of "consumer" with the *Wingo* remand in two ways. First, the Commission states that it "was tasked with establishing a factual record . . . after which, and only after which, [the Commission] could then make legal conclusions, such as potentially finding that the specific landlord in that case qualified as the 'consumer' under R.C. 4905.03(C)." (Opinion & Order ¶ 95.) That reasoning is flawed. As noted above, the Commission's interpretation of "consumer" in the Opinion & Order was not based on the "factual record" in this case but rather the Commission's reliance on *Pledger* and the other cases cited. In holding that the tenants of the Apartment Complexes are never "tenants," the Commission did not examine any of the facts in the lengthy record developed in this case. Rather, the Commission reached its interpretation of "consumer" based solely on prior precedent and based on generic reasoning that would apply in *any* submetering situation. That is not what *Wingo* ordered the Commission to do.

Second, the Commission attempts to reconcile its interpretation of "consumer" with *Wingo* on the ground that *Wingo* "partially granted a motion to dismiss, thereby striking from consideration in its ultimate decision Ms. Wingo's proposition of law that '[s]ufficient evidence exists to find that NEP is a 'public utility.'" (Opinion & Order ¶ 95.) Is the Commission

reasoning that *Wingo* did not remand the issue of whether NEP is a "public utility" to the Commission? That is at odds with the *Wingo* decision. As for the "partially granted" motion to dismiss, it is hard to tell what part of the *Wingo* decision the Commission is referring to, given that paragraph 195 of the Opinion and Order (where the Commission makes this point) does not include a paragraph or page number citation to *Wingo*. The only time the *Wingo* Court addressed the Commission's decision to grant a motion to dismiss under Rule 12(b)(6) is at the end of the opinion where the Court addressed Appellant Wingo's argument that the Commission improperly considered facts outside the pleadings. The Court, however, did not uphold this dismissal or endorse it in any way. Rather, the Court declined to address this argument as moot: "In light of our remand to the PUCO to apply the proper jurisdictional test, this matter does not present a live controversy." *Wingo*, 2020-Ohio-5583, ¶ 26. The Court then made clear that it "reverse[d] the PUCO's decision dismissing Wingo's complaint and remand[ed] the cause for further hearing." *Id.* ¶ 29. Nothing in *Wingo* endorsed the Commission's dismissal of the complaint in that case. And nothing in *Wingo* allowed the Commission to ignore the factual record here and hold that tenants are never "consumers" in any submetering configuration – a holding that, if correct, *Wingo* could have easily made itself, obviating any need for this lengthy and resource-intensive proceeding.

If, instead, the Commission had followed the *Wingo* remand mandate and its prior precedent of examining each case on its facts, the Commission would have found that the factual record here shows that there are *multiple* consumers in submetering arrangements—the landlord at the master meter *and also* the tenants at their apartments. The record shows that landlords do "consume" some of the electricity delivered to the master meter to power the landlord's office, pools, lights, and other common areas and amenities. (*See* NEP Ex. 90, Ex. G, at G-9 (CCSA §

1.4.1); AEP Ohio Ex. 1, Lesser Direct, at 59, 61; Tr. V at 983.) But the tenant also "consumes" electricity in the tenant's own apartment. It is the tenant who turns on and enjoys lights, televisions, ovens, hairdryers, etc. That is true on *Day One*, before conversion to submetering, where the tenant is indisputably a "consumer," and on *Day Two*, after conversion, when the tenant remains a "consumer." Moreover, NEP installs a meter for each tenant's apartment, and bills the tenant for her individual usage. NEP does not install individual meters to measure the *landlord's* usage at each apartment; that does not make sense. Rather, NEP's meter measures *the tenant-consumer's* usage at her apartment, and NEP bills the tenant (not the landlord) for that usage. (*See* NEP Ex. 90, Ex. G, at G-24 to G-26 (CCSA Ex. D); NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.2).) This means that NEP itself (and the landlord) regard the tenant as the consumer of the electricity used in her apartment, and it confirms that the tenant remains a "consumer" after the conversion to submetering.

There is a final, yet critical, reason the Commission's interpretation of "consumer" is in error: The Commission's interpretation of "consumer" is inconsistent with the Commission's regulation of submetering through the new "electric reseller tariff" the Opinion & Order (¶ 224) ordered AEP Ohio to establish. The very language the Commission uses in describing the new tariff demonstrates the errors in the Commission's interpretation of "consumer." The Commission calls the new tariff an "electric *reseller* tariff." (Opinion & Order ¶ 224 (emphasis added).) If NEP or the landlords are "resellers," whom are they *reselling* to? They are reselling to the tenants, which makes the tenants "consumers." Moreover, the Commission justifies the new tariff because "the Commission shares many of the concerns articulated by AEP Ohio regarding *consumer* protections." (Opinion & Order ¶ 223 (emphasis added).) Over and over, the Commission uses the word "consumer" in explaining the new tariff. (*See id.* ¶¶ 222-24.)

The section of the Opinion & Order in which the Commission creates the new tariff is entitled "*Consumer* Harm." (*Id.* ¶ 223 (emphasis added).) Elsewhere the Commission calls tenants the "ultimate end users" of electricity. (*Id.* ¶¶ 224.) This demonstrates the inconsistency of the Commission's reasoning. If tenants are not "consumers" under R.C. 4905.03(C), then the Commission has no jurisdiction to regulate the "resale" of electricity to tenants or to impose "consumer" protections related to these sales. Rather than mince words and rest on inconsistences, the Commission should, instead, recognize that the tenants are "consumers" of electricity (*i.e.*, the "ultimate end users") under the plain meaning of that word, and the Commission should protect those "consumers" by exerting jurisdiction over the sale of electricity by NEP to those consumers.

B. The Commission's Conclusion that NEP Is Not "Engaged in the Business of Supplying Electricity" Under R.C. 4905.03(C) Is at Odds with the Plain Meaning of "in the Business of" and "Supplying" and Incorrectly Credits Formalisms Such as "Agency" That Cannot Be Found in the Statute.

The Commission's second ground for holding that NEP is not "engaged in the business of supplying electricity or light, heat, or power purposes to consumers" under R.C. 4905.03(C) is the Commission's conclusion that NEP is not "engaged in the business of supplying electricity." (Opinion & Order ¶¶ 197-216.) As with the first ground, the Commission's statutory interpretation on its second ground was erroneous. Under the plain meaning of the words of the statute and the overwhelming factual record in this proceeding, NEP is clearly "engaged in the business of supplying electricity." R.C. 4905.03(C).

Throughout this proceeding, AEP Ohio has urged the Commission to focus on *substance over form* when applying R.C. 4905.03(C). (*See, e.g.*, AEP Ohio Initial Br. at 91-116; AEP Ohio Reply Br. at 16-30; AEP Ohio Ex. 1, Lesser Direct, at 9.) As AEP Ohio has pointed out, *substance over form* is an approach grounded in the statute. "Engaged" and "supplying" are

active verbs. When deciding whether an entity is a "public utility," it should not matter what an entity *calls* itself, but what an entity *does*. It should not matter what an entity *says*, but what activity the entity is "*engaged in*." R.C. 4905.03(C) (emphasis added). It should not matter what *words* are used in a contract, but what *actions* that contract requires the entity to perform. An entity should not be able to avoid regulation as a public utility merely by signing a piece of paper, or by any other formalisms devised by lawyers. (This is especially so where, as here, an entity quickly scrambles to sign new, meaningless formalisms *after the complaint is filed.*) What matters is the *substance*. Is an entity doing the kinds of things that "public utilities" do? Does the entity essentially *step into the shoes* of a public utility when a building converts to submetering? In short, is the entity "engaged in the business of supplying electricity . . . to consumers"?

Here, as AEP Ohio detailed at length in its Initial Brief (at 50-83, 91-116) and Reply Brief (at 16-30), the record contains numerous, undisputed facts showing that NEP *does* step into AEP Ohio's shoes and *is* "engaged in the business of supplying electricity . . . to consumers." These facts include, but are not limited to, the following:

- *Installing Equipment* – NEP installs meters and all other necessary distribution equipment at the property using its own money (not the landlord's). (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.3); Tr. VI at 1047; *see also* NEP Ex. 90, at G-12 (CCSA § 1.7).)

- *Maintenance and Repairs* – NEP maintains and repairs meters and other distribution equipment using its own money (not the landlord's). (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.2.1).)

- *Conversion* – NEP is responsible for all aspects of working with AEP Ohio to convert AEP Ohio's individual-meter residential service to master-meter service. (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.4); NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.4); NEP Ex. 90, Ex. G, at G-33 (Meter Install. Agmt. Cover Sheet); AEP Ohio Ex. 3, Williams Direct, at 23.)

- *Buying Master-Meter Service* – NEP is required to pay all bills related to master-meter service, including AEP Ohio's bill and the CRES provider's bill. (NEP Ex.

90, Ex. G, at G-9 (CCSA § 1.3.5). NEP pays AEP Ohio bills for over 150 accounts totaling more than $8.5 million annually. (AEP Ohio Ex. 3, Williams Direct, at 7.) NEP has unfettered discretion over whether to use a CRES provider and which provider to choose. (NEP Ex. 90, Ex. G, at G-8 (CCSA § 1.3.2).)

- *Reading Meters* – NEP is responsible for reading meters on a regular basis. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.1).)

- *Setting Rates* – NEP does not follow the landlord's instructions regarding rates but rather builds its rate for individual usage into its form contract. (AEP Ohio Ex. 1, Lesser Direct, at 62-63.)

- *Sending Bills* – NEP bills tenants for electric service. NEP designs its bills, which prominently feature NEP's name and information. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.2).)

- *Offering Payment Plans* – NEP has unfettered discretion to determine what plans to offer. (NEP Ex. 90, Ex. G, at G-11 (CCSA § 1.4.6).)

- *Customer Service* – NEP maintains a customer service center to field customer calls about service, billing, and other topics related to the provision of electric service. (AEP Ohio Ex. 1C, Lesser Direct, at 87-88.)

- *Disconnection* – NEP disconnects for nonpayment. (Tr. VI at 1096; AEP Ohio Ex. 1C, Lesser Direct, at 85-86.)

These are the *indicia* of an entity operating as a "public utility." These are the things a company does if it is "engaged in the business of supplying electricity . . . to consumers." R.C. 4905.03(C).

The Commission's decision, however, does not engage with any of these facts. Instead, the Commission focuses on a legal formalism – *agency* – that ignores what NEP *actually does*. Broken down to its essential elements, the Commission's reasoning is as follows:

(1) Under existing precedent, the landlords of the Apartment Complexes may resell electricity to the tenants themselves without being "engaged in the business of supplying electricity . . . to consumers" under R.C. 4905.03(C).

(2) NEP is the agent of the landlords.

(3) Therefore, despite all the evidence showing NEP has the *indicia* of an entity operating as a "public utility," NEP is not "engaged in the business of supplying electricity . . . to consumers" under R.C. 4905.03(C).

Although this reasoning is flawed in several respects, the most important flaw is that Step (3) does not follow from Steps (1) and (2).

As the Commission recognizes, previous cases have held that landlords are often not "in the business of supplying electricity . . . to consumers" when they resell electric service to their tenants. The principal reason for this conclusion is the Court's finding that landlords, in general, are in "the business" of being *landlords*, not in "the business" of supplying electricity. *Wingo* explained: "Thus, if metering services are completely ancillary to a business—say a building owner who simply passes on electricity costs as a convenience to its tenants—it would seem fair to say that the landlord is not "an electric light company" and is not "engaged in *the business* of supplying electricity." *Wingo*, 2020-Ohio-5583, ¶ 17 (emphasis in original). This is the landlord-tenant exception to R.C. 4905.03(C) that, as the Commission correctly recognized, AEP Ohio is not asking the Commission to overrule.[5]

The flaw in the Commission's "agency" reasoning was that the Commission incorrectly assumed, without analysis, that if a landlord is not in "the business" of supplying electricity, then neither is the landlords' purported agent, NEP, in "the business" of supplying electricity. That does not follow. It is undisputed that NEP is not in "the business" of being a landlord. There is no sense in which supplying electricity is "ancillary" to NEP's business—it is, rather, the very core of NEP's business, which NEP conducts at numerous properties in AEP Ohio's service territory. (*See, e.g.*, AEP Ohio Ex. 3, Williams Direct, at 7 (explaining that "there are over 150

[5] AEP Ohio reserves the right to make any argument concerning these past Supreme Court cases concerning the landlord-tenant exception and other Supreme Court precedents on appeal, including asking the Supreme Court to revisit and overrule its precedents, if appropriate.

accounts where bills are sent to NEP at their corporate address for over $8.5 million in annual charges" and that NEP serves approximately 1.75% of AEP Ohio's entire residential customer base).) Insofar as the Commission examined NEP's business, all the facts pointed to NEP being in "the business" of supplying electricity to the tenants. *See* Opinion & Order ¶¶ 198-206. Yet the Commission repeatedly dismissed these *indicia* of an entity operating as a public utility because NEP is purportedly the landlord's "agent." That is a red herring. Even if NEP is the landlord's "agent," the Commission must still examine what NEP does, and whether NEP itself is in "the business" of supplying electricity. As explained above, it clearly is.

The Commission also erred in crediting facts showing that NEP changed its relationship to the landlords during the proceeding. The record clearly shows that when AEP Ohio filed this complaint, the CCSA provided that NEP was the owner of the "Meter Equipment." (*See* AEP Ohio Initial Br. 56-57; NEP Ex. 90, Ex. G, at G-15 (CCSA § 5.1).) Yet several months after AEP Ohio filed this complaint, NEP and the property owners signed the Amendment and Supplement purportedly transferring ownership of the Meter Equipment to the property owners. (NEP Ex. 90, Ex. G, at G-42, G-84, G-128, G-172, G-217.) The Commission should have based its decision on the facts as they existed when AEP Ohio filed its complaint. Regardless, the Commission also erred in reasoning that "ownership" was important in deciding whether NEP is "engaged in the business of supplying electricity . . . to consumers" under R.C. 4905.03(C). An entity can engage in a business even if it *rents* its equipment or otherwise has the right to *use* equipment. AEP Ohio would be no less a "public utility" if it rented its distribution infrastructure or otherwise rested formal ownership of its distribution infrastructure in another entity.

There is another reason why the Commission erred in dismissing all the facts showing NEP is in "the business" of supplying electricity on the ground that NEP is an "agent" of the

landlord – namely, the special legal status of principals does not automatically confer to their agents. As AEP Ohio previously explained in its Initial Brief (at 110-111) and its Reply Brief (at 35-36), this kind of "legal status transfer" has no basis in the "black letter agency law" that NEP cited in support of its agency theory.

The concept of a principal's special legal status automatically transferring to agents makes no sense and would be completely unworkable if it were true. Consider, for instance, the example that AEP Ohio has twice presented in this case (Initial Br. at 110-111; Reply Br. at 35): An attorney licensed to practice law. An attorney may hire a non-attorney agent to enter into contracts on the attorney's behalf, but that agency relationship does not give the non-attorney agent the right to practice law. Indeed, the agency-law cases that NEP cites hold that a third-party can enforce a contract signed by the non-attorney agent against the attorney, but that in no way suggests that the non-attorney agent is now licensed to practice law. In the same way, landlords may be entitled to a certain treatment when they themselves submeter their tenants (*i.e.*, the traditional landlord exception to R.C. 4905.03(C)), but this special status does not automatically transfer to NEP if it is the landlord's agent. Instead, NEP must be evaluated on its own. Despite AEP Ohio prominently raising this argument[6] (Initial Br. at 110-111; Reply Br. at 35) – that legal status does not transfer from principal to agent – the Opinion & Order failed to address it.

[6] As AEP Ohio has pointed out (Reply Br. at 36), there are myriad other examples demonstrating that a principal's special legal status *does not* transfer automatically to its agents. A licensed doctor does not create additional licensed doctors by hiring agents; rather, anyone who practices medicine is treated separately under the law, and must be separately licensed, regardless of whether they are an agent of a doctor. If a nurse crosses the line from "nursing" to "practicing medicine," it is no defense that the nurse is the doctor's agent. Other examples abound. An entity that qualifies for a special tax abatement does not automatically transfer that abatement to its agents. A gambling company that is authorized to accept sports wagers in Ohio does not create additional authorized gambling companies by hiring agents. An agent of a worker eligible for worker's compensation payments is not entitled to the same payments herself because she is an agent of the eligible worker.

In support of the "agency" theory, the Opinion & Order (¶ 211) reasoned that AEP Ohio regularly hires agents, and this does not mean that these agents become "public utilities."[7] That reasoning is incorrect. Insofar as AEP Ohio hires agents, it is for limited projects or purposes. For instance, AEP Ohio may hire an agent to construct certain infrastructure, or to provide a specified service like tree trimming. These agents are clearly not "engaged in the business of supplying electricity . . . to consumers" because they handle only one small aspect of AEP Ohio's business, and that alone is not enough to be "in the business" of supplying electricity. This is not the situation for NEP. The facts show that NEP handles essentially *all aspects* of supplying electricity to tenants; the landlord's involvement is largely limited to signing a contract with NEP and sharing profits at the expense of tenants. If AEP Ohio did that – that is, if AEP Ohio hired a company-agent to take over essentially *all aspects* of AEP Ohio's business – that company-agent probably *would be* "engaged in the business of supplying electricity . . . to consumers" and therefore a public utility. The point is the Commission must examine each entity on its own, for what it does. If an entity does all the things a public utility does, then it is a public utility, regardless of whose "agent" it may be. And that is what AEP Ohio has demonstrated here by developing a comprehensive record of all the activities that NEP does that make it a public utility. It is no answer – and legally irrelevant – to say that NEP may have been an "agent" of landlords (or anyone else) while doing those things.

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[7] The Commission reasoned: "[W]e agree with NEP that contracting with service providers to perform these tasks does not in and of itself mean NEP is supplying electricity to tenants. Other non-third-party electrical companies who are contracted to perform similar work on infrastructure, whether as a contractor for AEP Ohio or for a landlord converting to master-meter service but not using a third-party submetering company, would not be considered a public utility when performing these services. Although those contractors likely would be paid directly by AEP Ohio or the landlord instead of by collecting revenues resulting from tenants' electric usage like NEP does, in the context of this case, we find that the payment arrangement, including the forward commission and residual payments described in the lease, was willingly agreed to by the landlords and NEP and, as such, our conclusion regarding their relationship remains the same." Opinion & Order ¶ 211.

There is yet another argument against NEP's agency theory that AEP Ohio made repeatedly, and the Commission did not address in its Opinion & Order – namely, that NEP cannot, legally or factually, be the landlord's agent because NEP does not follow the laws governing landlords. As AEP Ohio has pointed out (Initial Br. at 114-116), there are two circumstances in which NEP does not follow Ohio landlord-tenant law, thus proving that NEP is not acting as an "agent" of the landlord. First, NEP has not followed R.C. 5321.16(A), the Ohio landlord-tenant law that requires landlords to pay 5% interest on security deposits. (*See* Initial Br. at 114-115; Tr. VI at 1091-92; AEP Ohio Ex. 6, at 36 (NEP003663).) Second, and perhaps more importantly, NEP frequently disconnects tenants' electricity for nonpayment, even though R.C. 5321.12 generally prohibits landlords from disconnecting electricity or other utilities. (*See* Initial Br. at 115-116; AEP Ohio Ex. 1C, Lesser Direct, at 78; AEP Ohio Ex. 1C, Lesser Direct, Ex. SDL-5C; AEP Ohio Ex. 1C, Lesser Direct, Ex. SDL-6C.) This demonstrates that NEP cannot be an agent of the landlord, factually or legally. At a minimum, even if it were legally valid to automatically confer the special legal status of a principal on an agent (it is not, as described above), NEP should not be entitled to hide behind its claim of "agency" because it is not, truly, functioning as an agent. If it were, it would have paid 5% interest on security deposits, and it would *not* have been legally permitted to disconnect utility service for nonpayment. Once again, AEP Ohio made this argument throughout its briefing. (Initial Br. 114-116; Reply Br. 37-38.) Yet the Commission did not address it.

After incorrectly crediting NEP's "agency" theory, the Opinion & Order effectively reinstated the "SSO Price Test" through the "Reseller Tariff" the Commission ordered AEP Ohio to establish. (Opinion & Order ¶ 221.) As noted above (*supra* Section II.C), the Reseller Tariff and its reinstated "SSO Price Test" is inconsistent with the Commission's determination that

NEP is not "engaged in the business of supplying electricity," since if NEP is not "engaged in the business of supplying electricity" and is not an "electric light company" under R.C. 4905.03(C), then the Commission lacks jurisdiction to regulate what NEP may charge tenants for electricity. Moreover, the reinstated "SSO Price Test" is also a fallacy because it does not accurately gauge whether NEP is "engaged in the business of supplying electricity." NEP pays a reduced "bulk" rate for the kilowatt-hours of energy that AEP Ohio delivers to the master meter, and NEP then resells that energy to the tenants at a markup. Thus, it is entirely possible for NEP to make a profit by buying at the master meter and reselling at the "SSO Price" consistent with the reinstated "SSO Price Test." Accordingly, the SSO Price Test is not a valid means of interpreting "engaged in the business" under R.C. 4905.03(C). An entity may be "engaged in the business of supplying electricity" and making a substantial profit even if it is acting within the bounds of the SSO Price Test – indeed, that is NEP's entire business model.

IV. *Fourth Ground for Rehearing:* The Commission's Stay Order and Final Order Were Unlawful Because the Commission Failed to Consider Whether AEP Ohio's Forced Abandonment of the Apartment Complexes Was "Reasonable" and Promoted the "Welfare of the Public" Under the Miller Act, R.C. 4905.20-.21.

In its Initial Post-Hearing Brief, AEP Ohio explained why it would be unlawful for the Commission to direct AEP Ohio to convert the five Apartment Complexes to master metered service without first determining, under the Miller Act, whether such conversions are "reasonable," as that Act requires. (AEP Ohio Br. at 132-134.) As AEP Ohio noted, the Miller Act provides that no public utility shall "be required to abandon or withdraw any … electric light line … or any portion thereof, … or the service rendered thereby" without holding a hearing to "ascertain the facts" and determine that the proposed abandonment is "reasonable, having due regard for the welfare of the public … ." (*Id.* at 132 (citing R.C. 4905.20, R.C. 4905.21).) AEP Ohio went on to explain that, if the five Apartment Complexes were converted to master meter

service, the residents of the Apartment Complexes would cease to be AEP Ohio customers and the replaced lines and equipment would be abandoned, thus directly implicating the Miller Act and its requirements. (AEP Ohio Br. at 133.) And withdrawing individual service to those customers, AEP Ohio explained, would be unreasonable due to the numerous statutory and regulatory protections afforded under Ohio law to the customers of electric light companies – but not to the tenants of NEP's customers. (*Id.* at 134.)

The Commission's Opinion and Order, although lengthy, devotes only a single brief paragraph to AEP Ohio's contentions regarding the Miller Act. Opinion and Order ¶ 231. That short paragraph provides three bases for the Commission's rejection of those contentions. *Id.* Notably, all three of these bases are procedural or prudential in nature; none of them address the merits of whether the required conversions are, in fact, "reasonable" under the Miller Act. *Id.* First, the Commission implies (but does not directly state) that AEP Ohio waived its Miller Act arguments because "AEP Ohio's three counts within its Complaint do not specifically assert a Miller Act violation under R.C. 4905.20 and 4905.21." *Id*. Next, the Commission concludes that because the conversions of the Apartment Complexes were already completed before the Commission issued its Opinion and Order, "any determination as to proper abandonment is moot." *Id.* Finally, the Commission asserts that "AEP Ohio filed no separate application for abandonment for the Apartment Complexes based upon which we could make a decision." *Id.* For the reasons set forth below, all three of these grounds for rejecting AEP Ohio's Miller Act arguments are unlawful and unreasonable and should be corrected on rehearing.

A. AEP Ohio Did Not Waive Its Miller Act Arguments.

The Commission's single-sentence suggestion that AEP Ohio waived its Miller Act arguments is inconsistent with the text of the Miller Act itself, the text of AEP Ohio's Complaint, the Commission's precedent, and established Ohio case law.

As a threshold matter, the plain text of the Miller Act applies when a utility is "required to abandon" its facilities, R.C. 4905.20, and here that requirement arose from the Attorney Examiner's Stay Entry, the Commission's denial of AEP Ohio's request for an interlocutory appeal therefrom, and the Commission's Opinion and Order. Although R.C. 4905.21 speaks of *applications* for abandonment filed by railroads, political subdivisions, and public utilities, R.C. 4905.20 plainly anticipates other scenarios such as the one at issue here, when a utility is "required to abandon" its lines or service by Commission order or some other requirement, not based upon any application to do so submitted by the utility. *See* R.C. 4905.20; *see also State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 511 (1996) ("[T]he Miller Act . . . requires municipalities to obtain commission approval before *forcing abandonment* of non-municipal utility facilities or the withdrawal of non-municipal utility services.") And even in scenarios triggered by applications that may be filed pursuant to R.C. 4905.21, the Miller Act imposes no specific pleading requirement for those applications, saying only that they must be "in writing." R.C. 4905.21. The complaint statute applicable in the Commission, R.C. 4905.26, parallels this basic "in writing" requirement without imposing additional technical pleading requirements for Miller Act claims. R.C. 4905.26; *see also* OAC 4901-1-03 (form of pleadings).

AEP Ohio *did* clearly invoke the Miller Act in writing, in Paragraph 4 of its Complaint, by stating that AEP "strongly values its relationship with its customers and *should not be forced to abandon them*." (Emphasis added.) AEP Ohio also expressly asked the Commission not to "force" AEP Ohio to "abandon" its customers in Paragraphs 10, 70, 71, and 74 of the Complaint. And in its prayer for relief, AEP Ohio expressly requested a "finding and order that AEP Ohio need not terminate service to the Apartment Complex Customers and that AEP need not reconfigure and establish master meter service to the Apartment Complexes."

Although the Commission is not bound by the Ohio Rules of Civil Procedure, it has indicated that it "may use them for guidance in procedural matters."[8] Under those Rules, Ohio is a notice pleading state in which plaintiffs need only include a "short and plain" statement of their claims in their pleadings,[9] and the above-described allegations in AEP Ohio's Complaint put NEP on notice that any required, permanent conversion of the Apartment Complexes to master meter service would equate to a compelled abandonment of service implicating the Miller Act. It is well established that an Ohio complaint need not cite any specific Ohio statute by its assigned number in the Ohio Revised Code in order to meet Ohio's flexible notice pleading requirements and allow for relief to be granted under that statute. As the Ohio Supreme Court explained nearly three decades ago

Consistent with notice pleading standards, the Commission itself has previously declined to dismiss a Miller Act issue that was merely "inferred" – not expressly set forth – from a party's pleading. *In the Matter of the Complaints of Katherine Lycourt-Donovan, Seneca Builders LLC, and Ryan Roth et al.,* Case Nos. 12-2877-GA-CSS, 13-124-GA-CSS, & 13-667-GA-CSS, Opinion and Order at 3-4 (Jan. 14, 2015). In that case, a number of complainants alleged that Columbia Gas of Ohio, Inc. ("Columbia") unreasonably and unlawfully terminated gas service to all homes in a subdivision. *See generally id.* Although Columbia sought dismissal of Ms. Donovan's Miller Act claim due to her failure to expressly allege it, the Commission declined to do so, saying the claim was "inferred" from her complaint, and that "the applicability of the

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[8] *In the Matter of the Complaint of Edward B. Nenadal v. The Cleveland Electric Illuminating Company Relative to Alleged Unjust Charges Due to a Faulty Meter*, Case No. 84-1293-EL-CSS, Entry, 1986 Ohio PUC LEXIS 727, *5 (July 8, 1986).

[9] *See* Civ.R. 8(A)(1); *see also Patrick v. Wertman*, 113 Ohio App.3d 713, 716, 681 N.E.2d 1385 (3d Dist. 1996). "Because it is so easy for the pleader to satisfy the standard of Civ. R. 8(A), few complaints are subject to dismissal." *Leichtman v. WLW Jacor Communications, Inc*., 92 Ohio App.3d 232, 234, 634 N.E.2d 697 (1st Dist. 1994).

abandonment statute was an issue in these cases and at the hearing and will be reviewed by the Commission during the consideration of the evidence in these matters. *Id.* at 3-4.

Here, too, AEP Ohio's Miller Act claim could at the very least be "inferred" from its Complaint, due to the pleading's multiple references to abandonment of service, and the issue was also raised in pre-filed testimony and at hearing. (*E.g.*, AEP Ohio Ex. 1, Lesser Direct, at 28-32; Tr. Vol. I, at 68-75.) Moreover, under the Ohio Rules of Civil Procedure, issues "not raised by the pleadings" may yet be tried by express or implied consent of the parties. Civ.R. 15(B). Here, NEP's counsel elected to cross-examine Mr. Lesser at hearing regarding his Miller Act-related direct testimony, thereby expressing (or implying) NEP's consent that the issue be tried. *Accord Margala v. Berzo*, 11th Dist. Trumbull No. 2003-T-0155, 2005-Ohio-2265, ¶ 14 ("Factors to be considered in making a determination as to whether the parties impliedly consented to the litigation of a particular issue include: whether the parties recognized that an issue not in the pleadings entered the case; whether the opposing party had the opportunity to adequately address the issue or would offer additional evidence if the case were tried on a different theory; and whether the witnesses were subject to cross-examination on the particular issue.") As such, the Commission's failure to address the merits of AEP Ohio's Miller Act arguments runs counter to settled Ohio pleading practice and the Commission's prior approach in *Lycourt-Donovan*.

B. AEP Ohio's Miller Act Arguments Are Not Moot.

In addition to suggesting, wrongly, that AEP Ohio waived its Miller Act arguments by failing to "specifically assert a Miller Act violation" in its Complaint, the Commission also declines to address the merits of those arguments on mootness grounds. (Opinion and Order at ¶ 231.) For three separate but independently sufficient reasons, the Commission is mistaken and should correct its error on rehearing.

For one, the completion of the required conversions at the Apartment Complexes pursuant to the Commission's prior stay did not render the Miller Act claims moot. If that were the case, after all, then utilities and the Commission could render the Act a dead letter simply by completing unreasonable abandonments – or by requiring them to be completed – before any "reasonableness" determination about the abandonments had yet been made at any hearing. Put differently, the Commission and Ohio utilities could negate the Act's express requirements by ignoring them. Yet the General Assembly expressly cautions against constructions of statutes that would render them inoperative, ineffective, or infeasible of execution. R.C. 1.47(B) & (D). And this Commission has previously recognized that "Ohio law and the rules of statutory construction demand the Commission give effect to each and every word in the statute."[10] In *Lycourt-Donovan*, *supra*, for example, the fact that the gas service disconnection had already been accomplished at the plaintiffs' subdivision did not cause the Commission to dismiss plaintiffs' abandonment claims on mootness grounds. *See also In the Matter of the Complaint of Steve Bowman, et al., v. Columbia Gas of Ohio, Inc. and Columbia Gas Transmission Corporation Relative to the Allegations of Improper Maintenance of Gas Pipelines and Improper Termination of Service*, Case No. 83-1328-GA-CSS, Opinion and Order, (Feb. 17, 1988) (issuing a 1988 decision on the merits of a Miller Act claim even though the disputed pipeline had been taken out of service three years earlier in compliance with a federal agency order).

Second, the Commission's mootness determination is inconsistent with the concept of interim relief provided by stays. The conversions already completed here at the Apartment Complexes were undertaken by AEP Ohio pursuant to the Attorney Examiner's December 28,

[10] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, Seventh Entry on Rehearing, at ¶ 30 (Apr. 5, 2017).

2021 Stay Entry. In that Entry, the Attorney Examiner noted that the stay was granted so that "the status quo be maintained," and "stress[ed]" that the stay was *not* intended to prejudge the merits of this dispute. Stay Entry at ¶ 31. And when the Commission subsequently denied AEP Ohio's interlocutory appeal from the Stay Entry, the Commission did not modify this language in the Stay Entry; nor did the Commission state that AEP Ohio's compliance with the Stay Entry (*i.e.*, conversion of the Apartment Complexes to master meter service) would moot any of AEP Ohio's claims. *See generally* Entry (July 27, 2022). For the Commission to now use AEP Ohio's conversion activities (taken in *compliance* with the Stay Order) as the basis to dismiss AEP Ohio's Miller Act allegations undercuts the plain language and intent of the Stay Entry (purportedly, the preservation of the *status quo*, without any determination on the merits) as well as basic fairness. Ohio courts do not force parties to choose between the Scylla of disregarding a court order and the Charybdis of mootness[11] — indeed, that kind of forced choice is exactly what stays are supposed to prevent – and neither should this Commission.

Third, in deeming AEP Ohio's Miller Act allegations moot, the Commission failed to consider any of the exceptions to the mootness doctrine that have long been recognized and applied both by the Commission and the Ohio Supreme Court. There are at least two such exceptions to the mootness doctrine applicable here:

First, there is the settled mootness exception for issues that are capable of repetition yet evading review, which the Ohio Supreme Court has held requires just two factors to be present: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or

[11] *See, e.g., PR Transp., Inc. v. McClure*, 6th Dist. Lucas No. 2010-Ohio-1364, ¶ 11 ("Were this court to find Mr. Strong's withdrawal under the facts of this case amounted to a 'satisfaction of judgment,' we would in effect be creating a rule in disqualification matters whereby counsel would be forced to choose between disregarding the trial court's judgment (and facing contempt, possible disciplinary action, as well as sanctions against the client) and preserving the client's right to appeal the order disqualifying counsel. We decline to do so.")

expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *M.R. v. Niesen*, 167 Ohio St.3d 404, 2022-Ohio-1130, ¶ 11. Both the Commission and the Supreme Court have applied this mootness exception when those two factors are met. *See In the Matter of the Complaint of Donald Clark v. Ohio Edison Company*, Case No. 19-293-EL-CSS, Opinion and Order at ¶ 36 (Mar. 10, 2021) ("While Complainant's testimony may render his Complaint moot, we nevertheless continue to address the merits of his claims, as the actions he describes – parking cars near the transmission line – are not disputed and are capable of reoccurrence in the future."); *State ex rel. Beacon Journal Pub. Co. v. Donaldson*, 63 Ohio St.3d 173, 175 586 N.E.2d 101 (1992) (remanding courtroom closure case for merits review because even though closure order had terminated, such orders often evade review by expiring before review can be accomplished); *State ex rel. Repository v. Unger*, 28 Ohio St. 3d 418, 419, 504 N.E.2d 37 (1986) (same). Here, both of the required factors are present for the capable-of-repetition mootness exception to apply. The conversions to master meter service at issue here can be completed (or undone) in a duration of time far shorter than this lengthy litigation addressing their legality. And there is a reasonable likelihood that AEP Ohio will be subjected to the same required conversions again; the Commission's Opinion and Order requiring AEP Ohio to file a new electric resale tariff guarantees as much. Accordingly, instead of dismissing AEP Ohio's Miller Act claims on mootness grounds, the Commission should have addressed them on the merits, pursuant to the recognized exception for issues that are capable of repetition yet evading review.

Second, the Ohio Supreme Court has noted another exception to the mootness doctrine, holding that "[a]lthough a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the

matter appealed is one of great public or general interest." *State ex rel. White v. Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, ¶ 16 (citing *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St.3d 28, 505 N.E.2d 966 (1987), paragraph one of the syllabus; and *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 598, 653 N.E.2d 646 (1995).) That exception to the prudential (not obligatory) mootness doctrine applies here as well. Not only AEP Ohio, but also the many thousands of public consumers of electricity who are now sure to become part of NEP's new, big-business model of submetering, have a right to a merits decision by this Commission as to whether compelling AEP Ohio to abandon service to them passes muster under the Miller Act.

C. AEP Ohio Was Not Required to File a "Separate Application for Abandonment" to Properly Invoke the Miller Act in This Proceeding.

It is no excuse for the Commission to say that AEP Ohio did not file a separate Miller Act case. Opinion and Order ¶ 231. The Act itself nowhere requires a separate case, and it would be unduly wasteful to try the claims present here separately from an abandonment case. The Commission has previously addressed the merits of Miller Act claims asserted in conjunction with other claims, without the party seeking relief under the Miller Act filing any "separate" application of the type the Commission suggests is required in its Opinion and Order. For example, in *Lycourt-Donovan*, Ms. Lycourt-Donovan asserted her abandonment claim (which the Commission declined to dismiss) in conjunction with other claims: claims for inadequate service; that Columbia discriminated against her; and that Columbia violated the Commission's rules pertaining to the investigation of consumer complaints. *Lycourt-Donovan*, *supra*, Opinion and Order, at 8-17.

In addition to conflicting with its own precedents interpretating the same statute, requiring AEP Ohio to file an application in this context contradicts the plain text of R.C.

4905.21, which provides that a public utility "*desiring*" to abandon service "shall make application" to the Commission to do so. R.C. 4905.21 (emphasis added). AEP Ohio does not "desire" to abandon service to the many tenants of the Apartment Complexes, and thus should not be the party compelled to "make application" under a plain reading of R.C. 4905.21. AEP Ohio does not "desire" to see those former customers in its Certified Territory permanently removed from its customer rolls and stripped of the many protections afforded to customers of public utilities. Again, the statute says a party should "make application to the public utilities commission in writing" – that does not connote a separate or stand-alone application that only addresses the Miller Act claim as the Opinion and Order falsely assumes. Rather, the several references and requests in AEP Ohio's Complaint that cite the Miller Act are more than sufficient under R.C. 4905.21's plain language to have made application to the Commission in writing asking for a determination under the Miller Act. The issue was presented in the case in writing as part of the pleading that initiated this case and reinforced in testimony and subsequent pleadings; the Opinion and Order's "form over substance" approach, in tandem with the unlawful Stay Entry, ignores that the controlling statute mandates that Commission approval occur before any such abandonment can go forward. AEP Ohio only converted the Apartment Complexes in compliance with the Attorney Examiner's Stay Entry, which (improperly) required AEP Ohio to do so.

Accordingly, the Commission's determination that AEP Ohio was required to file a "separate" application to invoke the Miller Act is unreasonable, contrary to the express language of R.C. 4905.21, and should be corrected on rehearing.

D. On Rehearing, the Commission Should Conclude that the Required Conversions to Master Meter Service Are Unreasonable Under the Miller Act.

Because the Commission dismissed AEP Ohio's Miller Act arguments on procedural and prudential grounds, the Commission never reached the merits of AEP Ohio's contention that the compelled withdrawal of individual service to the tenants of the Apartment Complexes is not "reasonable, having due regard for the welfare of the public and the cost of operating the … facility" (R.C. 4905.21), because those tenants lose out on the numerous statutory and regulatory protections afforded under Ohio law to the customers of electric light companies. (AEP Ohio Initial Br. at 134.) On rehearing, the Commission should address the merits of AEP Ohio's Miller Act claim, conduct the reasonableness inquiry compelled by that Act, and make sufficient findings required under R.C. 4903.09 to explain how these numerous protections lost by AEP Ohio's former customers at the Apartment Complexes are "reasonable, having due regard for the welfare of the public[:]"

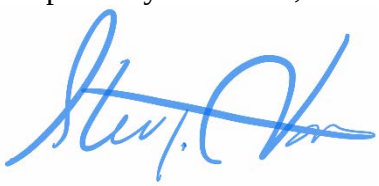
- the lost right to request meter tests to ensure compliance with ANSI accuracy standards;
- the lost assurance of reasonable rates and rate changes reviewed by the Commission;
- the lost right to shop for electricity supply;
- the lost protections afforded by the Commission's service disconnection rules;
- the lost access to PIPP and other extended payment plans that the Commission requires public utilities to offer their customers;
- the lost protections offered by the Commission's Special Reconnect Order for the winter heating season;
- the lost ability to bring informal and formal complaints in the Commission under R.C. 4905.26; and
- the public's loss of the portion of the Apartment Complexes' tenants' rates that would have been paid to Ohio's Universal Service Fund.

The Commission's failure to address these concerns on the merits in the context of a Miller Act inquiry negates the Act's central police-power purpose, which is to protect against unlawful abandonments of public utility service, whether such abandonments are "required" (per R.C. 4905.20) or "desire[d]" (per R.C. 4905.21).

CONCLUSION

For the foregoing reasons, the Commission should grant rehearing and reverse or modify the findings of fact and conclusions of law set forth in the Opinion and Order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 6th day of October 2023, via email.

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Summary: Application APPLICATION FOR REHEARING OF OHIO POWER COMPANY electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company.