IN THE SUPREME COURT OF OHIO

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

BRIEF OF DUKE ENERGY OHIO, INC., AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, OHIO POWER COMPANY

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STATEMENT OF INTEREST

Amicus curiae, Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company), is an electric light company pursuant to Ohio Revised Code (R.C.) 4905.03(C) and a natural gas company pursuant to R.C. 4905.03(E) and is, therefore, a public utility under R.C. 4905.02(A)

Like Appellant, Ohio Power Company (AEP Ohio), Duke Energy Ohio has observed a dramatic increase in the activity of Intervening Appellee, Nationwide Energy Partners, LLC (NEP), in the certified electric territory of Duke Energy Ohio. Indeed, Duke Energy Ohio has similarly filed a complaint against NEP at the Public Utilities Commission of Ohio (PUCO), arising out of separate, distinguishable, yet analogous facts as those underlying the AEP Ohio complaint at issue here. *Duke Energy Ohio, Inc. v. Nationwide Energy Partners, LLC*, PUCO No. 22-279-EL-CSS, Complaint (March 30, 2022).

NEP is a company engaged in "submetering," which has been described by the Ohio Supreme Court and the Commission as "a practice in which an entity 'engage[s] in the resale or redistribution of public utility services.'" *In re Complaint of Wingo v. Nationwide Energy Partners, LLC*, 2020-Ohio-5583, ¶ 3 (*quoting In re the Commission's Investigation of Submetering in the State of Ohio*, PUCO No. 15-1594-AU-COI, Fourth Entry on Rehearing, ¶ 4 (Jan. 9, 2019)).

As a general matter, Duke Energy Ohio recognizes that pre-*Wingo* case law recognizes a limited exception to the definition of a "public utility" under the traditional form of submetering, where a landlord/property owner resells utility services to individual tenants in a manner that is incidental to its landlord business. *Wingo*, 2020-Ohio-5583, ¶ 3. Consistent with that recognition and Ohio law, Duke Energy Ohio has permitted landlords/owners of multi-unit complexes that are being newly constructed to install a master meter for the purpose of submetering to individual tenants, with Duke Energy Ohio's prior written approval. Under the traditional submetering

arrangement that has been the subject of numerous Commission decisions, the utility provides services to the landlord/owner at one master meter, after which the landlord/owner resells those same utility services to individual tenants based on their proportionate share, as measured by the landlord's submeters. Such installations typically are made at the outset of construction of new residential complexes, at the time the utility is working with developers or property owners to design its electric distribution system to serve the anticipated load.

However, the current practice of submetering has drastically changed. Indeed, as the Ohio Supreme Court recently observed, submetering is "big business" today. *Wingo*, 2020-Ohio-5583, ¶ 3. Third-party submetering companies like NEP, which purport to act as the agent of the landlord, have exploited and distorted the traditional submetering arrangement, expanding it to encompass the conversion of individual, existing Duke Energy Ohio customers who happen to be tenants in buildings or complexes where the owner enters into a contract with NEP. Following NEP's conversion of a facility to submetering, those individuals lose all their rights as existing utility customers and consumers under Ohio law and the Commission's rules, instead becoming mere parties to contracts with their landlords. Opinion and Order, ¶¶ 194, 223-224.

From the standpoint of the impacted tenants, NEP undoubtedly looks like a public utility. It designs, constructs, and maintains the distribution system from the landlord's master meter to the individual apartments. It designs and issues tenant bills and communications. It offers a help desk to answer tenants' questions about their service. NEP is not just acting on behalf of the landlord; rather, NEP is separately and distinctly providing traditional utility services.

In addition to rights lost by the previous customers of electric utilities, the NEP business model results in impacts to the utility's remaining customers. When NEP converts existing electric distribution utility customers to master-metered tenants, the electric distribution utility stops

serving those individual customers and the electric delivery facilities previously invested in by the utility largely become useless. As the total number of customers decreases, there are fewer customers to pay the overall costs of utility service, meaning that, at a high level, the cost each customer must bear increases.

Operating electric distribution systems to serve thousands of end-use consumers is the very essence of operating as a "public utility" and being "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state . . .." R.C. 4905.03(C). Nevertheless, the Commission's decision below means that NEP is not subject to the same rigorous regulatory review, or standards, for the utility services it provides. This unfair result is to the detriment of electric distribution utilities, customers, and the entire system. The Supreme Court of Ohio should overturn the Commission's decision in the underlying proceeding or should remand the case for further consideration.

STATEMENT OF FACTS

Duke Energy Ohio hereby incorporates the facts as stated in the Merit Brief of Appellant Ohio Power Company.

ARGUMENTS IN SUPPORT OF APPELLANT'S PROPOSITIONS OF LAW

Ohio law provides a definition of an electric "public utility," based on whether an entity is acting as an "electric light company." That law, found in R.C. 4905.02 and 4905.03(C), states that an entity is an "electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state . . .." R.C. 4905.03(C). The various

terms in that section of law (*i.e.*, "consumer," "engaged in the business of," and "supplying") are parsed by the Commission and will be discussed below.

In addition to the statute itself, it is also important to start with a foundational understanding of the precedent that the Commission has historically considered in cases relating to submetering by landlords, as well as the more recent decision by this Court concerning submetering by a new category of "big business" third-party submetering companies like NEP. Following a line of authority that was described in the Opinion and Order below and will be discussed herein, in 1992 the Commission created a standardized test (the so-called "*Shroyer* test") for determining whether an entity – a manufactured home park owner, in that 1992 case – should be deemed a public utility, subject to the jurisdiction of the Commission. That *Shroyer* test was subsequently affirmed by this Court. *Pledger v. Pub. Util. Comm.,* 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶18; *In the Matter of the Complaints of Melissa E. Inscho, et al. v. Shroyer's Mobile Homes*, PUCO No. 90-182-WS-CSS, Opinion and Order, p. 4 (Feb. 27, 1992).

> The test . . . asks [three] questions, the answers to each of which lead to a determination of whether the entity is a public utility. The questions are:
>
> 1. Have the manufactured home park owners manifested an intent to be a public utility by availing themselves 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?
>
> 2. Are the . . . services available to the general public rather than just to tenants residing in the manufactured home park?
>
> 3. Is the provision of . . . services ancillary to the primary business of operating a manufactured home park?

In the Matter of the Complaints of Melissa E. Inscho, et al. v. Shroyer's Mobile Homes, PUCO No. 90-182-WS-CSS, Opinion and Order, p. 4 (Feb. 27, 1992). Looking just at this three-part test and how it applies to NEP's actions, the Commission should have found that NEP is a public

utility. Unlike the owner of a manufactured home park, which was constrained in scope to just one location, NEP creates mini-utilities throughout Ohio and thus offers services to the general public. And the provision of electric service to tenants in covered neighborhoods is the very essence of NEP's business. These factors will be discussed more fully below.

Twenty-eight years after the Commission issued its *Shroyer* test, this Court was presented with its first case involving NEP. *In re Complaint of Wingo v. Nationwide Energy Partners, LLC*, 2020-Ohio-5583. In *Wingo*, the Court reviewed the Commission's newly "modified" version of the *Shroyer* test and concluded that, while the original test was "moored in the statutory language," the modified version went beyond the statute, allowing the Commission to make "a policy judgment about who it wants to regulate." *Wingo*, ¶¶ 21-22. Therefore, the Court remanded the case back to the Commission for an analysis of its jurisdiction under the language of the applicable law. *Wingo*, ¶ 26. The Commission's parsing of the definition of a public utility, in the Opinion and Order below, comes as a direct result of this mandate from the Court, although the outcome of its efforts is a policy that is fraught with problems.

After all of the parsing is complete, and contrary to the Commission's decision below, it is vital to recognize that NEP is, without a doubt, acting in the role of a public utility. Its core business comprises numerous activities that are identical to those offered by Ohio's regulated utilities:

Activity / Service	NEP	Traditional Public Utility
Designs electric distribution system infrastructure	✓	✓
Installs electric distribution infrastructure (e.g., meters, weatherheads, conduits, wires, CT cabinets, transformers, disconnects, secondary cables, other electric service wiring, etc.)	✓	✓

Activity / Service	NEP	Traditional Public Utility
Maintains electric distribution infrastructure	✓	✓
Repairs electric distribution infrastructure	✓	✓
Required to operate electric distribution equipment in compliance National Electric Code or the National Electric Safety Code	✓	✓
Meter reading	✓	✓
Designs electric service bills	✓	✓
Issues electric service account numbers to customers	✓	✓
Calculates electric service charges	✓	✓
Uses customer service center to respond to customer inquiries regarding electric service	✓	✓
Hires and trains customer service representatives regarding electric service issues	✓	✓
Manages customer disputes regarding electric service	✓	✓
Issues electric service bills	✓	✓
Provides electric service payment plan offerings	✓	✓
Handles collections for electric service billing	✓	✓
Issues electric service refunds as applicable	✓	✓
Disconnects customers' electric service for non-payment or otherwise	✓	✓
Requires security deposits from electric service customers in certain circumstances	✓	✓
Recovers its costs through charges collected from customers for electric service	✓	✓

The Commission regulates public utilities' actions. However, under its decision below, the Commission has decided that it will not regulate NEP's actions, even though the Commission itself does not dispute the potentially serious harm to customers if NEP is rendered immune from all regulatory oversight on the basis that it is not a public utility (even though its activities clearly

mimic those of a traditional public utility, as illustrated above). Opinion and Order, ¶ 224. The Commission's decision attempts to rectify that problem by forcing all incumbent utilities to regulate the provision of electric service from landlords to tenants in their respective service territories.

Importantly, however, the Commission fails to appreciate the import of its holding on the long-standing regulatory scheme for public utilities in Ohio. Taking the Commission's holding to its logical extreme, what if a public utility from a neighboring state reached into Ohio to offer its distribution services, as an "agent" of the landlord, just like NEP? Would it be excused from regulation because of that agency fiction? Or what if an in-state public utility from one part of Ohio sought to enter into contracts with landlords in the certified service territories of other Ohio public utilities on the basis that it is simply operating as the agent of the landlord pursuant to a private contract? Would that in-state public utility be regulated by the Commission only in its own service territory but not in those of its neighboring incumbent utilities? These questions are not considered by the Commission but seem to be logical extensions of the dangerous policy the Commission espouses.

I. 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.

A. The Commission failed "to apply R.C. 4905.03 and determine whether NEP is an electric light company" as directed by *Wingo,* instead ignoring key evidence and relying on inapplicable precedent to reach a result that conflicts with the plain language in the controlling statutory definition.

1. The Commission's definition of "consumer" in R.C. 4905.03(C) is contrary to that term's plain meaning and against the manifest weight of the evidence in the record.

Quoting R.C. 4905.03(C), which provides the definition of an "electric light company," the Commission starts its analysis of the law in the underlying Opinion and Order with a conclusion

that only landlords – and not the landlords' tenants – are consumers of electricity in the factual circumstances presented in the proceeding. Opinion and Order, ¶ 184. The Commission bases its flawed conclusion on its review of precedent. That precedent is inapposite.

The Commission's first citation is to a century-old decision by this Court, which concluded that a landlord, reselling electricity to a single tenant, was not a public utility. Opinion and Order, ¶ 188. The entirety of the Court's rationale was 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 (1928) (citation omitted). Contrary to the Commission's implication, this case did not address the question of whether a landlord or a tenant, or both, are consumers. The word "consumer" does not even appear in the opinion.

The Commission next claims that this Court, in *Shopping Centers Ass'n v. Public Utilities Com.*, found that "the Commission did have jurisdiction . . . because the landlord was the consumer." Opinion and Order, ¶ 189. Although the Court did indeed conclude that the Commission had jurisdiction over the public utility when the public utility was selling to a landlord/consumer who subsequently resold a portion of the electricity to a tenant, it did so based on an important rationale that the Commission conveniently failed to mention:

> **In the public interest it is desirable that the operations of an Ohio public utility come within the jurisdiction of the Public Utilities Commission of Ohio, and in line with such thesis** 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" within paragraph (A), subdivision (4) of Section 4905.03, Revised Code, even though by submetering these institutions resell a part of such electric energy to others connected with them in a business way.

Shopping Centers Ass'n v. Public Utilities Com., 3 Ohio St.2d 1, 6 (1965) (emphasis added). The Court did not, in that case, consider whether the landlord was a consumer to the exclusion of the tenants living therein. *Shopping Centers*, Syllabus ¶ 2 (finding that the term "consumer" **includes** the landlord, even though that landlord may be subsequently submetering). It merely concluded that, because it was desirable to find that the Commission has jurisdiction and because the landlord also used electricity itself, the landlord was a "consumer," such that sales to the landlord made the seller a public utility. *Id.*

The Commission's third reference is to a complaint case filed in 1994. *Brooks v. The Toledo Edison Company,* PUCO No. 94-1987-EL-CSS, 1996 Ohio PUC LEXIS 292 (May 8, 1996). The situation in that case, as was clearly spelled out by the Commission in the complaint case decision, was one where the landlord was the redistributor of electricity, and that same landlord owned the property upon which the redistribution (or resale) occurred. *Brooks*, 1996 Ohio PUC LEXIS 292, p. 13. The Commission concluded that it had to assert jurisdiction over the relationship between the public utility and the landlord and noted that prior precedent did not **require** it to regulate the arrangement between the landlord and the tenant. The Commission certainly did not consider the question of whether the tenant in such a situation was already, itself, a "consumer" of electricity.

The Commission next points to a 2006 decision by this Court, in which the Court concluded that a landlord is the consumer of services provided by a water and sewer utility. *Pledger v. Pub. Util. Comm.*, 2006-Ohio-2989, ¶¶22-24, 37-38. The Commission specifically relies on the conclusion that the landlord was the consumer of the utility services but does not appear to recognize that the Court's conclusion is meaningless unless viewed in the context of the factual circumstances. The Court did **not** say that a tenant would never also be a consumer. And it did

not say that the landlord would be the consumer if, for example, its submetering provision of utility services was its primary business. The situation in *Pledger* is not even remotely analogous to one in which the primary business of a submeterer is that of submetering.

The Commission wrongly interprets this chain of cases to mean that a tenant, in a submetering situation, can **never** be a consumer. It also misinterprets the Court's holdings by adding a critical modifier: saying that the landlord "is the **'ultimate'** consumer." Opinion and Order, ¶ 194 (emphasis added). But after reaching this odd, unsupported conclusion, even the Commission itself cannot help but refer to tenants as the users of the electricity, when discussing their lost rights, thereby emphasizing the fact that its conclusion does not fit with the ordinary understanding of the concept of who actually consumes the electricity:

> [T]he Commission shares many of the concerns articulated by AEP Ohio regarding **consumer** protections.

Opinion and Order, ¶ 223 (emphasis added).

> 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.

Opinion and Order, ¶ 224 (emphasis added).

> 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.

Opinion and Order, ¶ 224 (emphasis added).

> 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.

Opinion and Order, ¶ 225 (emphasis added).

Based on its own experiences with NEP's business model, Duke Energy Ohio urges this Court to recognize that the question of who is the "consumer" for purposes of the definition of an "electric light company" has not been decisively answered by this Court and cannot be addressed without first applying the facts of record to the controlling statutory language, as directed by *Wingo*. The cases reviewed above clearly reflect that the Court's previous decisions arose from fact situations involving landlords who were not in the primary business of submetering and whose submetering activities occurred solely on their own property; these decisions should not and cannot be applied to a situation that is so acutely different than the ones previously considered by the Court.

Here, as will be discussed below, it is NEP's actions that must be reviewed based on *Wingo's* directive to apply the facts of record to the pertinent statutory language in R.C. 4905.03. And if NEP is found to be acting as a public utility, then the question of who consumes the utility services provided by NEP, in the role of a utility, will be quite different than it was in any of the cited precedent, necessitating a conclusion that the tenants are the obvious consumers of the electric services supplied by NEP.

2. The Commission's conclusion that NEP is not "engaged in the business of supplying electricity" under R.C. 4905.03(C), is also at odds with the plain meaning of "in the business of" and "supplying" and incorrectly credits formalisms such as "agency" that are patently unreasonable and undermine the statute.

As this Court has made it abundantly clear, the determination of an entity's primary business must ask whether the entity is in the "business of **supplying** water through pipes or tubing." *Wingo*, ¶ 20 (quoting *Pledger*, ¶ 27) (emphasis in original). Thus, the Commission is not to base its jurisdictional determination on whether the entity in question is in the business of buying and selling a commodity or service. *Id.*

The question the Commission had to consider here was whether NEP was in the business of providing electricity through wires. The Commission's factual review resulted in its belief that NEP was acting – supposedly as the landlord's agent – to perform two primary roles: (1) NEP was to "facilitate" conversion of the properties to master metering and (2) NEP was to "handle nearly all aspects of electric service resale to tenants . . .." Opinion and Order, ¶ 209. Regardless of this conclusion, the Commission still found that NEP was not engaged in the business of supplying electric service. Opinion and Order, ¶¶ 211, 214.

The Commission bases its conclusion first on the fact that the landlord itself could have performed these same activities, without becoming a utility. Opinion and Order, ¶ 211. But this is irrelevant to whether NEP could perform these activities without becoming a utility. As the application of the facts to the plain meaning of the statutory text will show in the discussion below, the outcome must be different for NEP than for the landlord, as NEP is not engaging in these activities on its own private property.

The Commission also confusingly suggests that any finding other than the one they reached would encroach on freedom of NEP and the landlords to enter into contracts. Of course, NEP and the landlords with whom NEP does business could still enter into whatever contracts they like, so long as those contracts are consistent with Ohio law. And, from a policy standpoint, it must also be recognized that there are other contracts that the law should protect. All of the former customers of the incumbent utility had contracts (through tariffs approved by the Commission) with that utility. And many of the former customers likely had exercised their right to shop for a competitive supplier of generation services, with whom those customers certainly had contracts. The Commission's decision prioritizes the landlords' contracts at the expense of the tenants' contracts.

Duke Energy Ohio, like AEP Ohio, and indeed all of its electric light company counterparts in Ohio, installs distribution equipment. They all maintain and repair that equipment. They recover their investments in that distribution equipment. NEP performs all of those same activities for the ultimate use by tenants and to its own financial benefit. Electric light companies read customers' meters, issue bills to customers for the services performed and the commodity used, and offer the services of customer call centers to answer questions about service and billing issues. NEP likewise reads meters, issues bills, and offers the services of a customer call center. The electric light companies do not own the property on which these services are offered and ultimately consumed. Neither does NEP. How is it possible that these electric light companies qualify as public utilities while NEP, through the fiction of an "agency" relationship that purports to keep Ohio law and the Commission's "tests" from applying to it, does not? *See* Opinion and Order, ¶¶ 200-206, 214.

Although the bulk of the Commission's consideration of whether NEP is acting in the role of a public utility is based on an analysis of statutory language and precedent that similarly reviewed that language, it also considered the application of the *Shroyer* test to the NEP situation. Opinion and Order, ¶¶ 217-221. To the extent the Court continues to apply the original *Shroyer* test in the wake of the *Wingo* decision, the *Shroyer* test poses three questions, "the answers to each of which lead to a determination of whether the entity is a public utility" (*Shroyer*, p. 4): "(1) whether the entity has 'manifested an intent to be a public utility by availing [itself] of special benefits available to public utilities'; (2) whether the utility service is available to the general public rather than to a specific class of residents; and (3) whether the provision of utility services is 'ancillary' to the entity's 'primary business.'" *Wingo*, ¶ 11 (*citing Shroyer*). Duke Energy Ohio

will briefly address the second and third prongs of the test, "the answers to each of which lead to a determination of whether the entity is a public utility." *Shroyer*, p. 4.

The second *Shroyer* prong asks whether the services in question are available to the general public, rather than just to tenants in a single facility. *Shroyer*, p. 4. Focusing on the services that are offered by NEP, in the course of its business, it is uncontroverted that NEP offers its services at many locations, to many landlords, with countless tenants. "Today, submetering is big business, with third-party resellers such as NEP providing submetering services for multiple properties and landlords." *Wingo*, p. 2 and fn. 1. This is as true in Duke Energy Ohio's certified electric territory as it is in AEP Ohio's. Because NEP is the epitome of the new, big-business style of submetering, with tens of thousands of tenants served, its cannot be said that NEP offers its services to a single landlord at a time. *See* https://www.nationwideenergypartners.com/our-story/ (last accessed, April 11, 2024). NEP easily meets the second prong and, as such, should be deemed a public utility.

The third *Shroyer* prong is also met by NEP. That prong asks whether the provision of the services in question – here, electric delivery services – is ancillary to the primary business of NEP. *Shroyer*, p. 4. Again, because it is NEP that must be the subject of inquiry, it is NEP's business that must be considered. Not only is the delivery of electricity to submetered tenants **not** ancillary to NEP's business, it is the very essence and core of that business. Electricity delivery is precisely the business in which NEP is engaged.

The Court must conclude that NEP meets the statutory definitions for a public utility and an electric light company and also meets at least two prongs of the three-pronged *Shroyer* test approved by this Court.

B. Since none of this Court's pre-*Wingo* submetering decisions involved the conversion of existing utility consumers to submetering, and none involved third-party big-business submetering companies, the Court should critically

distinguish those cases relied upon by the Commission and reverse the decision below; alternatively, the Court should abandon the general landlord-tenant exception to R.C. 4905.02(C) – because such an overbroad application of the judicially-created exception is neither grounded in the controlling statutory language nor based on a case-by-case application of the law to the facts.

In deciding this case, the Commission relied on old precedent that analyzed and applied law to a submetering business that was vastly dissimilar in at least two ways from the submetering that AEP Ohio and Duke Energy Ohio are now facing.

First, in all of the cases cited by the Commission as the bases of its decision, the submeterer was the owner of the property in which the electric usage was submetered. Here, however, the submeterer – NEP – is a third party who is not the owner and is unrelated to the owner other than through a contractual relationship. And, furthermore, it is undeniable that NEP performs those same services in other buildings and communities, in precisely the same manner.

The Commission's Opinion and Order starts its analysis of the *Shroyer* test by restating its conclusion that the landlord, and not NEP, is "supplying electricity." Opinion and Order, ¶¶ 220, 221. Based on that conclusion, the Commission entirely sidesteps the question of whether the provision of utility service is ancillary to **NEP's** primary business, looking instead at only the landlord's business. Evaluation of the landlord's business was appropriate when the landlord was doing the work of the submetering, on its own property, but that is not how the business is operated in the situations at issue here. NEP is a large business, controlling the electric services provided at many properties, and serving myriad tenants. Like AEP Ohio, Duke Energy Ohio has seen this trend increasing in its own service territory. It is not analogous to the installations where the landlord submeters its own facilities.

The pre-*Wingo* precedent on which the Commission relies is also distinct from the current situations based on NEP's practice of approaching owners of existing facilities with tenants who

are existing individual customers of the local public utility, and converting those facilities to ones that are submetered by NEP. This results in negative impacts, both in terms of the rights lost by the people who were previously electric light company customers and in terms of the financial outcome on the electric light company's bottom line and the costs that must be borne by all other customers of the incumbent utility. From an economic perspective, the whole idea of submetering conversions conflicts with the regulated monopoly model for electric distribution service.

AEP Ohio powerfully expressed its concerns for its lost customers in its complaint, pointing to a number of customer rights and benefits that are lost as a result of NEP's conversion of facilities to submetering. The Commission recognized this:

> 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 [*sic*]; consumer costs is [*sic*] 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.)

Opinion and Order, ¶ 79. Duke Energy Ohio agrees. The harm to consumers who lose these benefits of utility service should not be ignored. Nor should it be glossed over by requiring the incumbent utility somehow to police this Commission-created divestiture of rights. Even the Commission seems to have agreed that these customer losses are matters of concern. As will be further addressed below, the Commission's refusal to accept jurisdiction over NEP resulted in its

convoluted effort to extend customer protections by turning public utilities into quasi-regulators, through Commission-mandated tariff provisions. Opinion and Order, ¶¶ 224-5.

The financial impact of NEP's property conversions on the incumbent public utility and its other customers is also undeniable. The monthly customer charge for individual residential customers, set by the Commission on the basis of the utility's cost to serve customers, is substantially higher for all of the individual tenant customers of multi-family properties than it would be for service to the singular landlord of the entirety of each facility. On top of that, the usage-based costs are higher for individual residential customers than for the rates typically serving landlords. These differences are the basis of NEP's "arbitrage" and result in the profits that make NEP's business viable. But those profits come at a cost to the remaining utility customers.

Duke Energy Ohio would also note that the Commission could, in theory, solve this problem by approving changes to electric utilities' tariffs that would erase the ability of NEP to take advantage of existing rate structures by arbitraging that difference. Whether the Commission would be willing to approve such a change is unknown. Whether that should be the outcome might, perhaps, be an issue for the General Assembly. But whether there is a more straight-forward solution, such as concluding that existing law allows – and, indeed, forces – the Commission to regulate NEP as the public utility that it seems to be, is up to this Court.

Duke Energy Ohio respectfully suggests that, in light of the proliferation of third-party submetering, the Court should abandon the landlord-tenant exception to regulation of submetering.

II. The "electric reseller tariff" ordered by the Commission is unreasonable and unlawful based on 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 produces an unlawful result where the Commission can "write its own jurisdictional rules"– including reinstatement of the "SSO Price Test" vacated in *Wingo*.

A. The Commission's resurrection of the vacated "SSO price test" through a tariff contravenes the express instructions of the Court's remand order in *Wingo* and is another ground for reversal.

B. 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" but proceed to invent a weak substitute for utility regulation through AEP Ohio's tariff.

C. By ordering the "Electric Reseller Tariff," the Commission unlawfully imposed requirements on AEP Ohio and other parties in Ohio and expanded the scope of its disconnection rules (Adm.Code 4901:1-18), thereby enacting rules of general applicability without following the statutory requirements for rulemaking found in R.C. Chapter 106.

1. The Commission did not provide AEP Ohio and other interested parties adequate notice and opportunity to be heard.

2. The Commission failed to follow mandatory statutory procedures required to amend the administrative rules that the Commission intends to apply to all electric utilities in the State.

As argued by AEP Ohio, the Commission's decision to regulate the transactions between NEP and tenants through the tariffs of all Ohio electric distribution utilities is wrong. It violates the precepts of *Wingo.* It violates Ohio's laws on administrative rulemaking in R.C. Chapter 106. It exceeds the scope of the Commission's jurisdiction if, as the Commission wrongly claims, NEP is not an electric light company. And, in addition, it violates the non-party electric light companies' rights to due process. Ohio Constitution, Article I, Section 16. Such due process includes, at a minimum, notice and an opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (Considering the federal right to due process, the U.S. Supreme Court explained that "'[t]he fundamental requisite of due process of law is the opportunity to be heard.' This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.") (*quoting Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

No electric light company other than AEP Ohio was a party to the underlying complaint case by AEP Ohio against NEP. Indeed, AEP Ohio's Application for Rehearing at the Commission complains that the tariff amendments that the Commission was demanding would be the result of a ruling akin to a rulemaking, without applying uniformly across the state by picking up non-party electric utilities. *See* Application for Rehearing, pp. 42-43. The Commission's entry addressing this argument on rehearing astoundingly applied its new mandate to all other Ohio electric utilities with a stroke of a pen, stating:

> 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.

Second Entry on Rehearing, ¶ 36 (emphasis added). In the quoted language, the Commission seems to think that this "expectation" is analogous to the crisis that occurred in 2022 with regard to Northeast Ohio Public Energy Council (as described in the cited Entry). However, the Commission, in *Northeast Ohio*, merely asked the electric utilities to work with Commission Staff to develop tariff changes that could assist with preventing similar occurrences in their respective territories. The Commission did not, as here, demand that all tariffs now comply with a specific set of requirements, which requirements were determined in a complaint case in which other electric utilities were not included.

Where a broad-based Commission requirement is specific in nature, it is the very essence of a rule and should therefore only be promulgated by the Commission through the preset process of R.C. Chapter 106. Without compliance with that law, uninvolved entities such as Duke Energy

Ohio are denied the due process of law that is assured them under the Ohio Constitution. Ohio Constitution, Article I, Section 16. This Court should reject the Commission's attempt to engage in rulemaking without consideration of the due-process rights of the entities it seeks to regulate.

CONCLUSION

In order to prevent the risk of harm to electric customers throughout the state of Ohio, NEP must be held accountable and must be regulated by the Commission just as all other public utilities are regulated.

For all of the foregoing reasons, the Court should reverse the Commission's decision and direct the Commission to assert jurisdiction over the business of NEP.

Respectfully submitted,

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PROOF OF SERVICE

I certify that the Amicus Curiae Brief of Duke Energy Ohio, Inc., was served by electronic delivery upon counsel identified below for all parties of record this 22nd day of April, 2024.

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