

IN THE SUPREME COURT OF OHIO

Ohio Power Company, : **Supreme Court Case No. 2024-0207**
Complainant/Appellant :
 :
 : **Appeal from the Public Utilities**
v. : **Commission of Ohio**
 :
 :
Nationwide Energy Partners, LLC, : **Public Utilities Commission of Ohio**
Respondent/Intervening Appellee : **Case No. 21-990-EL-CSS**

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INTRODUCTION

There is no place in Title 49 or any other part of the Revised Code where the General Assembly recognizes the concept of “submetering,” nor is there any statute that permits for-profit entities such as Intervening Appellee Nationwide Energy Partners, LLC (“NEP”) to make retail electric sales outside the jurisdiction of the Public Utilities Commission of Ohio (“Commission”). Yet, the Court long ago, in *Jonas v. Swetland Co.*, 119 Ohio St. 12 (1928), created a limited “landlord-tenant exception” to the Commission’s jurisdiction under Title 49 for landlords that purchase service from a public utility and then divide and resell those utility services to tenants by measuring their individual usage through meters installed behind the utility meter (“submeters”). Despite the fact that it is now 96 years after the legal status of the original form of submetering was first decided in *Jonas*, this appeal will be only the second time the Court is presented with the new, “big business” form of submetering to decide whether a third-party, non-landlord entity engaging in that business is a “public utility” under R.C. 4905.03 – and the first instance was less than four years ago in *In re Complaint of Wingo v. Nationwide Energy Partners, LLC*, 2020-Ohio-5583 (“*Wingo*”).

Because the Commission had created its own jurisdictional test under R.C. 4905.03 and failed to apply the language of the controlling statute to the novel facts involving NEP as a big business, third-party submetering company, the Court reversed – directing the Commission on remand “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 at ¶ 26. Following the *Wingo* remand, the case below *should have been* the first time the Commission applied the controlling statutory language to the new form of submetering, per the Court’s instruction. Instead, the Commission failed to adhere to this Court’s remand instructions from *Wingo* to simply apply the facts to the statutory language, finding instead that NEP is not a

“public utility” based on the pre-*Wingo* caselaw that had addressed the original form of submetering. The decision below should be reversed as unlawful and unreasonable.

First, 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. 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. And 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 are patently unreasonable and undermine the statute. As the Court has recently reiterated in *TWISM Ents., L.L.C. v State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, “[w]hen it comes to interpretation of text involving common words used in their ordinary sense, there will rarely, if ever, be a need for a court to look to an agency interpretation. This task is routinely performed by courts and is well within the judiciary’s core competence.” *TWISM* at ¶ 47. Applying these principles, the Court should reverse the Commission’s conclusions that contradict the plain meaning of the statute and the manifest weight of the record. As a related matter, 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.

Second, 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 resurrection of the “SSO Price Test” vacated in *Wingo*. The Commission’s reinstatement of the “SSO price test” through a tariff contravenes the express instructions of the Court’s remand order in *Wingo* and is another ground for reversal. 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 attempt to selectively regulate them through the tariffs of Ohio Power Company (“AEP Ohio”) as if they were. Moreover, by ordering the “Electric Reseller Tariff,” the Commission unlawfully expanded the scope of its disconnection rules (Adm.Code 4901:1-18; OPC Appx. 235 *et seq.*) and enacted other rules of general applicability without following the statutory rulemaking procedures in R.C. Chapter 106 (*i.e.*, the Commission did not provide interested parties notice or an opportunity to be heard before adopting the rules and failed to follow the mandatory procedures to create or amend rules).

Third, the Commission’s “narrow and limited” ruling in favor of NEP’s Counterclaim is an unreasonable and unlawful application of the complaint case statute. That statute, R.C. 4905.26, is a jurisdictional and procedural mechanism, and does not provide an independent standard that a utility can “violate” but is procedural and non-substantive – as the Commission has correctly determined in prior cases. This Court has also acknowledged the difference between procedural laws such as R.C. 4905.26 and substantive laws that impose affirmative duties or obligations. In short, it is unreasonable for the Commission to fault AEP Ohio for its actions following dismissal of the complaint in *Wingo*, 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. In so concluding, the Commission unlawfully 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.

In sum, due to the Commission’s orders appealed here, AEP Ohio now finds itself in the untenable position of having to compete with NEP to serve tenants at apartment complexes in AEP Ohio’s service territory. Such competition is a lop-sided affair when NEP can entice the landlords (which are not the end-users of the electric service) with cash payments, while AEP Ohio is told it can do nothing as it continues to lose customers even though it has an exclusive legal right to provide distribution service to all consumers in its territory. For the foregoing reasons, the Court should reverse the Commission’s decision.

STATEMENT OF FACTS

A. NEP’s requests to convert Five Apartment Complexes to submetering and AEP Ohio’s complaint filing.

In October 2020 (just two months before the Court’s *Wingo* decision was issued), NEP submitted an unprecedented request to *convert* five properties (the “Five Apartment Complexes”) with over 1,000 existing AEP Ohio customers to master meter service that would be submetered by NEP. (Complaint, Ex. A, NEP Ex. 24, OPC Supp. 355;¹ *see also* Tr. II at 247-248, OPC Supp. 2-3.) Out of the 1,171 existing AEP Ohio accounts at these properties, at the time of filing the Complaint below, 510 of them were exercising their statutory right to shop for competitive generation services, 56 were availing themselves of the budget billing offered by

¹ The Composite Index docketed at the Commission on Dec. 19, 2022, lists the exhibits admitted at the evidentiary hearing below. Non-confidential exhibits referenced in AEP Ohio’s Merit Brief are included in AEP Ohio’s Supplement and cited as “OPC Supp.” Confidential exhibits admitted under seal are available for the Court’s review in the Commission’s electronic record.

AEP Ohio, and 3 customers were taking advantage of the PIPP Plus program for low-income customers. (AEP Ohio Ex. 3 at 18, OPC Supp. 326.)

There was a lot of uncertainty after this Court's *Wingo* decision. (Tr. III at 424, OPC Supp. 8.) To that end, counsel for AEP Ohio immediately notified NEP's representative that AEP Ohio was "re-evaluating our position in light of the Court's ruling this week." (Complaint, Ex. A, NEP Ex. 24, at 2-3, OPC Supp. 356-357.) In early June 2021, AEP Ohio notified NEP that the conversion requests for the Five Apartment Complexes would be denied based on the Commission-approved tariff that prohibited unlawful resale. (Tr. II at 343, OPC Supp. 6; *see also*, NEP Ex. 26, OPC Supp. 358.) In September 2021, AEP Ohio reiterated its denial of the conversion request based on the understanding that allowing "NEP to take over providing electric service to the customers at the [Five] Apartment Complexes, it would be operating unlawfully as a 'public utility' and an 'electric light company' under R.C. 4905.03." (NEP Ex. 24, at 1, OPC Supp. 355.) AEP Ohio simultaneously informed NEP that it was proactively seeking Commission input by filing a complaint case so that the Commission could decide the matter. (*Id.* at 2-3, OPC Supp. 356-357.)

After AEP Ohio filed its complaint, the Commission issued a provisional Entry requiring (over AEP Ohio's objection) that the conversion process go forward. Accordingly, the Commission ordered AEP Ohio to cease providing regulated monopoly distribution service to over 1,000 customers; thereby abandoning and severing retail relationships so that NEP could provide service to those tenants. (AEP Ohio Ex. 3, at 19, OPC Supp. 327.) Yet, the issue remained as to whether NEP was acting as an unregulated utility in violation of Ohio law and AEP Ohio's tariff. An evidentiary hearing commenced on October 24, 2022, and post-hearing briefs were completed by January 20, 2023.

B. NEP’s business model and activities at the Five Apartment Complexes.

NEP began operations in 1999 and expanded over time significantly and “[grew] into hundreds of apartments and condominium complexes in the AEP Ohio service territory.” (NEP Ex. 90, at 4, OPC Supp. 362; *see also* AEP Ohio Ex. 3 at 7, OPC Supp. 315.) According to AEP Ohio records at the time of the 2022 hearing below, “there [were] over 150 accounts where bills [were] sent to NEP . . . for over \$8.5 million in annual charges.” (AEP Ohio Ex. 3, at 7, OPC Supp. 315.) At that time, NEP served about 1.75% of AEP Ohio’s residential customer base. (*Id.*) In 2021, NEP became one of AEP Ohio’s top-ten largest purchasers. (*Id.*, Ex. JFW-1, OPC Supp. 332.)

1. NEP’s design, installation, ownership, operation, and maintenance of the electric distribution infrastructure.

AEP Ohio delivers bulk power to NEP’s master meters at secondary voltage (240 volts) at the Five Apartment Complexes. (*Id.* at 21-22, OPC Supp. 329-330.) Under the contract between NEP and its landlord clients at the Five Apartment Complexes, known as the Commodity Coordination Service Agreement (“CCSA”), NEP is responsible for installing all distribution equipment. (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.3), OPC Supp. 416.) Accordingly, NEP installed weatherheads, conduit, wires, and CT cabinets at the Five Apartment Complexes. (Tr. VII at 1222-1226, OPC Supp. 27-31.) In addition to the CCSA, NEP and the property owner execute a separate “Meter Installation Agreement” governing NEP’s installation of the metering portion of the distribution equipment. (NEP Ex. 90, Ex. G, at G-33 (Meter Install. Agmt.), OPC Supp. 442.) Thus, NEP installed significant distribution infrastructure – the same types of equipment that AEP Ohio installs as a utility to directly serve those same customers – at each of the Five Apartment Complexes. (*Id.*)

The Meter Installation Agreements and the CCSAs for the Five Apartment Complexes state that the property owner will pay NEP “\$0” for the equipment and that it will be installed “at Provider’s [NEP’s] cost.” (NEP Ex. 90, Ex. G, at G-12 (CCSA § 1.7), OPC Supp. 421; *id.* at G-33 (Meter Install. Agmt. Cover Sheet), OPC Supp. 442; *see also* Tr. VII 1222-1223, OPC Supp. 27-28; Tr. VI at 1047, OPC Supp. 14.) NEP’s Meter Installation Agreement says NEP must install the distribution equipment, among other things, “in compliance with the National Electric Code or the National Electrical Safety Code.” (NEP Ex. 90, Ex. G, at G-35 (Meter Install. Agmt., Service Terms § 5), OPC Supp. 444.) That safety code is the same standard for utility equipment that AEP Ohio and other public utilities must follow. *See* Adm.Code 4901:1-10-06 (OPC Appx. 234).

The CCSA also made NEP contractually responsible for all aspects of converting each tenant’s individual-meter residential service being provided by AEP Ohio to master-meter service. (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.4), OPC Supp. 416.) Indeed, NEP is the exclusive counterparty, financier and sole point of contact throughout the conversion process. (AEP Ohio Ex. 3 at 23, OPC Supp. 331; NEP Ex. 90 at G-7 (CCSA § 1.1.4), OPC Supp. 416; *see also id.* at G-33 (Meter Install. Agmt. Cover Sheet), OPC Supp. 442.) Under the CCSA, NEP also establishes and pays for electric distribution and generation service at the master meter. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.3.5), OPC Supp. 418.) This includes bestowing NEP with unfettered discretion to choose the generation service supplier for the Five Apartment Complexes. (*Id.* at G-8 & G-9 (CCSA § 1.3.1-1.3.3), OPC Supp. 417-418.)

Suspiciously, NEP changed the contractual provisions governing ownership of the Meter Equipment *while the complaint proceeding was pending*. NEP originally owned the Meter Equipment, but after AEP Ohio filed its complaint, NEP and the property owners executed the

Amendment and Supplement to Meter Installation Agreement and Commodity Coordination Service Agreement to amend section 5.1 of the CCSAs (despite no evidence that there was any consideration), which purportedly changed the meter ownership so that now the property owners are “deemed” to be the owners of the Meter Equipment. (*Id.* at Ex. G, at G-42, G-84, G-128, G-172, & G-217, OPC Supp. 451, 493, 537, 580, 625; *see also* Tr. VI at 1054-55 (Confidential).) Nevertheless, NEP remains solely responsible for maintaining and repairing the electric distribution system it installs, and performs all maintenance and repairs at its expense. (NEP Ex. 90, Ex. G, at G-7, G-12 (CCSA § 1.2.1, CCSA § 1.7), OPC Supp. 416, 421; *see also* Tr. VI at 1048, OPC Supp. 15.) NEP is responsible for reading these meters and using the meter data for billing the individual tenants for electric service. (*Id.* at G-9 (CCSA § 1.4.1), OPC Supp. 418.)

2. NEP’s interaction with residential tenants.

NEP’s communications with tenants confirm that NEP holds itself out as the company responsible for maintaining and repairing the “distribution equipment” that distributes electricity to the tenants’ homes. In an NEP customer-service document titled “Service Outage Info,” NEP provides numerous explanations to customers that mimic the type of information that AEP Ohio provides to its customers. (*See* AEP Ohio Ex. 1C, Ex. SDL-2C, at 1 (Confidential).)

NEP is also contractually responsible for sending tenants monthly electric bills in which NEP charges tenants for their usage and their share of the community’s common-area usage. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.2), OPC Supp. 418.) While the CCSA provides NEP with broad discretion over bill format (*id.*), NEP’s bill format is strikingly similar to AEP Ohio’s and NEP’s witness admitted that NEP’s bill format mimicked utility bill formats. (AEP Ohio Ex. 1, at 63-65, OPC Supp. 97-99; *see also* NEP Ex. 90, at 19-20, OPC Supp. 377-378.)

NEP is authorized by Section 1.4.6 of the CCSA to provide payment plans to tenants who are having trouble paying their NEP electric bills, albeit within NEP's complete discretion. (*Id.*, Ex. G, at G-11 (CCSA § 1.4.6), OPC Supp. 420.) NEP does not, however, offer access to the Percentage of Income Payment Plan (PIPP), a funded program created by the General Assembly to help low-income customers pay their utility bills. (Tr. VI at 1109-10, OPC Supp. 24-25.) NEP also maintains a customer service center and employs customer service representatives to field calls about service, billing, and other topics – just like public utilities.

3. Disconnection of electric services to tenants served by NEP.

If a tenant fails to pay an NEP bill or enter into an NEP payment plan, NEP may disconnect electric service to the tenant's unit – a right that NEP exercises frequently. (NEP Ex. 90, Ex. G, at G-11 (CCSA § 1.5), OPC Supp. 420; *see also* AEP Ohio Ex. SDL-1C at 78 (Confidential); *see also id.* at Ex. SDL-5C & Ex. SDL-6C (Confidential.) Even though R.C. 5321.15 generally prohibits landlords from disconnecting utility service for failure to pay rent, under CCSA § 4.4.1, NEP claims to be disconnecting on behalf of the landlord, for electric usage is purportedly part of the “rent” that the tenant is required to pay. (NEP Ex. 90, Ex. G, at G-14 (CCSA § 4.4.1), G-11 (CCSA § 1.5), OPC Supp. 423, 420; *see also* Tr. VI at 1096, 1101-02, OPC Supp. 18, 21-22.) NEP's internal documents include scant references to obtaining direction from property owners and show that NEP is not actually taking “direction” from the landlord; rather, NEP is acting as an independent third-party. (AEP Ohio Ex. SDL-1C at 85-86, Ex. SDL-12(C) (Confidential).)

Unlike a regulated utility such as AEP Ohio, NEP picks and chooses which of the robust disconnection rules set forth in Adm.Code 4901:1-18 it chooses to follow. For instance, NEP does not wait at least two months after a bill is sent for disconnection (*see* Adm.Code 4901:1-18-

06(A)(1), OPC Appx. 246); NEP does not provide the same notices that are required under the Commission's rules or waiver approvals; and its disconnection notices make no references to medical certificates or PIPP. (See Adm.Code 4901:1-18-06(A)(5)(g) & (h), OPC Appx. 248-249). (See AEP Ohio Ex. 1 at 78-81, 83, OPC Supp. 112-115, 117; see also Ex. SDL 8-C (Confidential).)

C. NEP's profitable business at the expense of tenants' legal rights.

NEP incurs all costs to provide electric service to the tenants, and then NEP is allowed to keep all funds it receives from tenants after billing them for this service – NEP's electric bills instruct tenants to remit payment to NEP, not the property owner. (NEP Ex. 90, Ex. G, at G-11, G-12, & G-13 (CCSA § 1.5, CCSA § 3.1), OPC Supp. 420-422.) The delta between the bulk electric rates paid to AEP Ohio and the higher rates charged to tenants is the profit that NEP and the landlords share. The property owner never writes NEP a check. (*Id.* at G-12 to G-13 (CCSA § 3.1), OPC Supp. 420-421.) NEP witness Ringenbach repeatedly refers to this as “rate arbitrage.” (*Id.* at 5, 17, 23, 51, OPC Supp. 363, 375, 381, 409.) Indeed, NEP's rate arbitrage business model results in so much profit that NEP actually pays the property owners money, through two different mechanisms, in exchange for being granted an exclusive monopoly-like franchise to sell electric service to their tenants. The CCSA refers to the first mechanism as a “door fee” – an upfront payment (referred to as a “forward commission”) that NEP makes to the property owner as an inducement to sign the contract. (NEP Ex. 90, Ex. G, at G-33 (Meter Install. Agmt. Cover Sheet), OPC Supp. 442.) The “door fee” for the Five Apartment Complexes ranges from \$22,000-\$72,000. (*Id.* at G-33, G-76, G-119, G-163, & G-208, OPC Supp. 442, 485, 528, 571, 616.) The second mechanism is the “residual payment,” which is a

“monthly payment of \$6.00 per Qualified Unit” that NEP makes to the property owner. (*Id.* at G-16 (CCSA § 6.1), OPC Supp. 425.)

ARGUMENT

Proposition of Law No. 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.

This Court recently had the opportunity to clarify whether an administrative agency’s interpretation of a statutory term should be given deference when reviewed on appeal. *TWISM Ents., L.L.C. v State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677. The Court held that “the judicial branch is *never* required to defer to an agency’s interpretation of the law,” explaining that “any judicial deference to administrative agencies is permissive rather than mandatory and may occur only when a statutory term is ambiguous.” *Id.* at ¶¶ 3, 40 (emphasis original). If a statute is ambiguous, a Court may defer to agency interpretation – but the weight, if any, given to it “should depend on the persuasive power of the agency’s interpretation and not the mere fact that it is being offered by an administrative agency.” *Id.* at ¶ 45. The *TWISM* Court reached a conclusion that is instructive here:

When it comes to interpretation of text involving common words used in their ordinary sense, there will rarely, if ever, be a need for a court to look to an agency interpretation. This task is routinely performed by courts and is well within the judiciary’s core competence.

Id. at ¶ 47. In reversing the previous Commission decision as to whether NEP is a public utility, this Court did not categorically rely on the pre-*Wingo* caselaw to dispose of the issue (as the Commission did in its decision below), but instead remanded the issue – directing the Commission “to apply R.C. 4905.03 and determine whether NEP is an electric light company.” *Wingo*, 2020-Ohio-5583 at ¶¶ 19, 26. Pursuant to these principles, the Court should overrule the

Commission’s heavy reliance on the pre-*Wingo* caselaw² interpreting the original landlord-tenant exception and independently determine whether NEP’s new form of submetering engages “in the business of supplying electricity” to “consumers” based on the record.

- 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.**

The Commission determined 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) and therefore is not an “electric light company” or “public utility” subject to the Commission’s jurisdiction. (Opinion & Order ¶ 179, OPC Appx. 87.) In support of that conclusion, the Commission erroneously found that the tenants being converted to submetering were not “consumers” and NEP is not “engaged in the business of supplying electricity.” (*Id.*, ¶¶ 184-188 & 197, OPC Appx. 90-91 & 96.) Those conclusions should be reversed as they contradict the plain meaning of the statute and the evidence of record here.

- 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.**

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” under the statute. (*Id.*, ¶ 184-197, OPC Appx. 90-96.) That interpretation was incorrect and against the manifest weight of the evidence in the record below.

² Proposition of Law I.B, *infra*, discusses in more detail why the Court should either critically distinguish the pre-*Wingo* caselaw or abandon the judicially-created landlord-tenant exception that is not grounded in the controlling statute.

Under the plain meaning of the statute, submetered tenants must be “consumers” – especially since the very same tenants were always consumers before the submetering conversion.

Applying *TWISM*, the Court has no reason to defer to the Commission’s misguided interpretation of a common term like “consumer” and should, instead, concur in the interpretation only if it is more persuasive than AEP Ohio’s interpretation. *Cf. Cablevision of the Midwest v. Gross*, 70 Ohio St.3d 541, 545 (1994) (holding that a reasonable use of a broad, undefined statutory term would be to reflect the General Assembly’s belief that the statute should be broad and inclusive); *see also Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 2011-Ohio-2720, ¶ 44 (rejecting the Commission’s unduly narrow construction of the statutory term “arrangement”).

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. Internatl. Assn. of Fire Fighters v. Sakacs*, 2023-Ohio-2976, ¶ 18. *Merriam-Webster Dictionary* defines “consumer” as “one that consumes, such as one that utilizes economic goods.”³ *Merriam-Webster* provides five definitions of “consume,” the most pertinent of which is “to utilize as a customer.”⁴ The *Oxford English Dictionary* defines “consumer” as “[a] person who uses up a commodity; a purchaser of goods or services, a customer.”⁵

³ Merriam-Webster Online, <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.”

⁴ Merriam-Webster Online, <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.”

⁵ Oxford English Dictionary Online, <https://www.oed.com/search/dictionary/?scope=Entries&q=consumer>.

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 good in her apartment. She turns on her lights to see, uses her toaster or oven to cook food, and powers her television to be entertained. The tenant also “utilizes” electric service as a “customer.” *Merriam-Webster* defines “customer” as “one that purchases a commodity or service.”⁶ 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. Under the ordinary meaning of “consumer,” the submetered tenant is a “consumer” of electricity.

That the word “consumer” must be defined to include submetered tenants is further confirmed by examining what changes – or, rather, what *does not* change – when a building is converted to submetering. On *Day One* (*i.e.*, before conversion), a tenant uses electricity in her home to power her appliances, and the tenant pays AEP Ohio based on her usage. On *Day One*, therefore, the tenant is plainly a “consumer” as defined in R.C. 4905.03(C), and AEP Ohio is “engaged in the business of supplying electricity” to the tenant as a “consumer.” On *Day Two* (*i.e.*, after the apartment building is converted to submetering), the tenant *still* uses electricity in her home in the very same way as on *Day One*. She *still* turns on her appliances, and now she pays NEP based on her electric usage. Nothing has changed about how the consumer *consumes* electricity – there is simply a new resale transaction that occurs between NEP and the tenant/consumer, instead of between AEP Ohio and the tenant/consumer. Applying the dictionary definition of “consumer” and “consume” described above, the tenant “utilizes the

⁶ Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/customer>. *Merriam-Webster* also provides a second definition of “customer” that is not pertinent here: “an individual usually having some specified distinctive trait.”

economic good” of electricity in the same way on *Day One* and *Day Two*. There was no basis, therefore, for the Commission to apply the term “consumer” in R.C. 4905.03(C) on *Day Two* differently (and more narrowly) than on *Day One*.

Although the Commission gave lip service to the Court’s remand directive in *Wingo*,⁷ the Opinion and Order did not follow the *Wingo* Court’s directive “to determine whether it has jurisdiction based upon the jurisdictional statute, not the modified *Shroyer* test.” *Wingo*, 2020-Ohio-5583, at ¶ 26. This Court had pointedly instructed that “the PUCO will need to apply R.C. 4905.03 and determine whether NEP is an ‘electric light company.’” *Id.* But despite the *Wingo* Court’s reversal and specific remand instructions, the Commission’s decision largely fails to address this point and, instead, broadly relies on caselaw that did not involve conversions or third-party submetering companies under the new, big-business form of submetering.

The Commission misapplied this Court’s precedent in two related but distinct ways. First, the Commission failed to distinguish the prior caselaw based on a critical factual differences presented here: none of the prior cases involved conversion of existing utility customers to submetering; and none of the pre-*Wingo* cases involved third-party submetering companies like NEP. Second, instead of applying the plain meaning of “consumer” to the factual record, the Commission relied on prior cases that had applied the term “consumer” to *landlords*. None of the pre-*Wingo* cases addressed whether the tenants are also “consumers” in submetered buildings.

For instance, Paragraph 193 of the Opinion & Order focuses on one sentence from this Court’s *Pledger* decision, stating that there is no authority that “supports the assertion that in a

⁷ See Opinion & Order ¶ 181; OPC Appx. 89 (“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 ...”).

landlord-tenant relationship, it is the tenant rather than the landlord who is the consumer of the commodity provided by a water-works utility.” (OPC Appx. 93-94, citing *Pledger v. Pub. Util. Comm.*, 2006-Ohio-2989, ¶ 35.) The Commission apparently takes this sentence to mean that a tenant cannot *ever* be a “consumer.” (Opinion & Order ¶ 194, OPC Appx 94.) 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 involve a third-party submetering company such as NEP at all. *See generally Pledger, supra*. Moreover, *Pledger* did not involve a conversion scenario like the case below, with the starting point being that the tenant is a consumer purchasing electricity from a regulated utility. *Id.* So, *Pledger* did not address the circumstances presented here, or whether there are circumstances in which the tenant, like her landlord, is also a “consumer.” *Cf.* Opinion & Order, Separate Opinion of Commissioner Conway ¶ 6 (OPC Appx. 164) (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”).

Consider an example to illustrate this point. If a convenience store owner buys candy from a bulk-buying store (*e.g.*, Costco, Sam’s Club or BJ’s), then resells individual pieces of candy at his own retail convenience store, the convenience store owner is a consumer in the first transaction but the second person that buys and ultimately eats the candy is a consumer in the final retail transaction. It would be unreasonable for the store owner to try to claim that the second/resale transaction was not subject to Ohio consumer laws or sales tax. Rather, the ultimate consumer must be a consumer, no matter how many additional or prior transactions

there are before the final sale. The same logic applies to a consumer buying a used car or boat or “scalping” a concert ticket from the original purchaser. Here, using the facts of record and applying the statute’s plain meaning, the tenants at the Five Apartment Complexes must be “consumers” of electricity under R.C. 4905.03(C) – both before and after conversion to submetering by NEP.

Moreover, the Commission’s interpretation of *Pledger* and the other cases cannot be reconciled with the Court’s reasoning in *Wingo*, the most recent case to address submetering and the only prior case to address third-party submetering companies such as NEP. Of course, the *Wingo* Court was aware of *Pledger*, 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.” If that were true, then why did the *Wingo* Court not just say that? Why did *Wingo* instead remand the question of whether NEP is a “public utility” to the Commission with precise instructions “to apply R.C. 4905.03 (not the caselaw) and determine whether NEP is an ‘electric light company’ . . . ‘in the business of supplying’ any of the covered services”? *Wingo* at ¶ 26. The obvious answer is that *Pledger* simply did not address that question and the Commission’s reliance on it here was misplaced.

The Commission’s categorical “finding” here – that a submetered tenant is never a “consumer” – also conflicts with all of the prior decisions (at the Commission and the Court) where a case-by-case approach is required. Instead of weighing the facts and circumstances of after the development of an evidentiary record, 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 (and is legally incorrect). There is no reasonable basis for the Commission to reject its

prior, correct approach of basing its decisions on the facts of each case in an unlawful attempt to “write its own jurisdictional rules that go beyond the statutes drafted by the General Assembly.” *Wingo*, at ¶ 21.

If, instead, the Commission had followed the *Wingo* remand mandate and its prior precedent requiring that each case be examined on its facts, the Commission would have found that the factual record shows there are *multiple* consumers in submetering arrangements: the landlord at the master meter (based on purchase from AEP Ohio in the original sale) *and* the tenants at their apartments (based on purchase from NEP in the second/resale transaction). Such an approach was especially appropriate because the case below involved novel facts with the new conversion scenario and the new, big-business form of third-party submetering.

Moreover, as part of the conversion process, NEP installs a meter for each tenant’s apartment (to replace the AEP Ohio meter that was removed), and then bills the tenant and receives payment for her individual usage. NEP does not install individual meters to measure the *landlord’s* usage at each apartment; the landlord is not consuming electricity inside the tenant’s apartment space. Rather, NEP’s meters measure *the tenant-consumer’s* usage at her apartment, and it is not disputed that 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), OPC Supp. 433-435); *see also id.* at G-9 (CCSA § 1.4.2), OPC Supp. 418.) 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. None of the caselaw relied upon by the Commission says otherwise.

There is a final, yet critical, reason why the Commission’s interpretation of “consumer” is mistaken: elsewhere in the same decision, the Commission itself creates a “reseller”

regulation and refers to the tenants as “consumers” and the “ultimate end users.” (Opinion and Order at ¶¶ 223-224, OPC Appx. 111-114.) That approach undercuts the Commission’s conclusion that tenants are *not* consumers in the second (resale) transaction. The Commission calls the new tariff an “electric *reseller* tariff.” (*Id.* at ¶ 224, OPC Appx. 114) (emphasis added). If NEP or the landlords are “resellers,” whom are they *reselling* to, if not consumers? How is the transaction subject to Commission jurisdiction if NEP is not a public utility, and the tenants are not consumers? Of course, the answer is that NEP is indeed reselling to the tenants, which makes the tenants “consumers.” Moreover, the Commission explains that its new Tariff Directive is needed because “the Commission shares many of the concerns articulated by AEP Ohio regarding *consumer* protections.” (*Id.* at ¶ 223, OPC Appx. 112 (emphasis added).) Over and over, the Commission uses the word “consumer” in explaining the new tariff. (*See id.* at ¶¶ 222-24, OPC Appx. 112.) The section of the Opinion & Order in which the Commission creates the new tariff to protect tenants is titled “*Consumer* Harm.” (*Id.* at ¶ 223, OPC Appx. 111 (emphasis added).) Moreover, the Commission calls tenants the “ultimate end users” of electricity. (*Id.* at ¶ 224, OPC Appx. 113.) The Commission went on in the next paragraph to issue detailed “consumer protection” regulations to protect the tenants who the Commission refers to as the “ultimate end user” through a directive for AEP Ohio to file a tariff. (*Id.* at ¶ 224, OPC Appx. 112-14.)

Those passages plainly expose the order’s counter-factual flaw in concluding that only the landlord is a consumer. Although the Commission can be commended for its after-the-fact attempt to protect tenant-consumers, its Solomonian, split-the-baby solution exposes the reality that the tenants are the real consumers and ultimate end-users that are being (re)sold electric service 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.

The Commission’s second ground for holding that NEP is not a “public utility” under R.C. 4905.03(C) is that NEP is not “engaged in the business of supplying electricity.” (*Id.* at ¶¶ 197-216, OPC Appx. 96-109.) Again, the Commission’s statutory interpretation conflicts with the plain language of R.C. 4905.03 and is against the manifest weight of the evidence. Under the statute’s plain meaning and based on the overwhelming factual record, NEP is clearly “engaged in the business of supplying electricity.” The Court should not defer to the Commission’s unreasonable interpretation of the statute, but instead should reverse it as being unlawful and unreasonable.

Below, AEP Ohio consistently 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 (Dec. 16, 2022); AEP Ohio Reply Br. at 16-30 (Jan. 20, 2023); AEP Ohio Ex. 1, at 9, OPC Supp. 43.) “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 it actually *does*. Stated differently, an entity should not be able to avoid regulation as a public utility merely by signing a piece of paper, or by other formalisms devised by lawyers. This is especially so where, as here, the entity tries to obscure its intent and actions by signing new, meaningless formalisms *after the complaint is filed*.

The record below contains numerous, undisputed facts confirming 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), OPC Supp. 416; *id.* at G-12 (CCSA § 1.7), OPC Supp. 421; *see also* Tr. VI at 1047, OPC Supp. 14.);

- *Maintenance and Repairs* – NEP maintains and repairs meters and other equipment using its own money (not the landlord’s). (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.2.1), OPC Supp. 416.)
- *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), OPC Supp. 416; *id.* at G-33 (Meter Install. Agmt. Cover Sheet), OPC Supp. 442; *see also* AEP Ohio Ex. 3, at 23, OPC Supp. 331.)
- *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), OPC Supp. 418.) NEP pays AEP Ohio bills for over 150 accounts totaling more than \$8.5 million annually. (AEP Ohio Ex. 3, at 7, OPC Supp. 315.) 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), OPC Supp. 417.)
- *Reading Meters* – NEP is responsible for reading meters on a regular basis. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.1), OPC Supp. 418.)
- *Setting Rates* – NEP does not follow the landlord’s instructions regarding rates. NEP builds its rate for individual usage into its form contract. (AEP Ohio Ex. 1, at 62-63, OPC Supp. 96-97)
- *Sending Bills* – NEP bills tenants for electric service, and NEP’s bills prominently feature NEP’s name and information. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.2), OPC Supp. 418.)
- *Offering Payment Plans* – NEP has unfettered discretion to determine what plans to offer. (*Id.* at G-11 (CCSA § 1.4.6), OPC Supp. 420.)
- *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. 1 at 88-89; *see also* AEP Ohio Ex. 1C at 87-88 (Confidential).)
- *Disconnection* – NEP disconnects for nonpayment. (Tr. VI at 1096, OPC Supp. 18.); *see also* AEP Ohio Ex. 1C, at 85-86 (Confidential).)

These undisputed facts in the record plainly reflect an entity operating as a “public utility” by “engag[ing] in the business of supplying electricity . . . to consumers.” R.C. 4905.03(C).

The Commission did not engage with any of these facts. Instead, the Commission clung to NEP’s legal formalism – *agency* – and relied on the judicially-created landlord-tenant

exception. But that approach ignored what NEP *actually does* and defied *Wingo*'s directive to determine whether NEP's actions constitute a "public utility" based on the language of R.C.

4905.03(C). Broken down to its essential elements, the Commission's reasoning is as follows:

- (1) Under existing precedent, the landlords of the Five Apartment Complexes may resell electricity to their tenants without being "engaged in the business of supplying electricity . . . to consumers" under R.C. 4905.03(C).
- (2) NEP is merely an agent of the landlords, according to its own contracts.
- (3) Therefore, despite all the evidence showing NEP undertakes the very same actions as 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 held that landlords are often not "in the business of supplying electricity . . . to consumers" when they merely resell electric service to their tenants in an incidental manner. The principal reason for this is the Court's finding that landlords, in general, are in "the business" of being *landlords*, not in "the business" of supplying electricity. So, resale of electricity by landlords to tenants is incidental to being a landlord.

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), as established by the pre-*Wingo* caselaw (*i.e.*, it is not found in the statute).

The flaw in the Commission’s “merely an agent” 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. That assumption conflicts squarely with the evidentiary record below. 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* AEP Ohio Ex. 3, at 7, OPC Supp. 315) (explaining that “there are over 150 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. (Opinion & Order ¶¶ 198-206; OPC Appx. 96-101.)

Yet the Commission repeatedly disregarded NEP’s actions operating as a public utility simply because NEP is purportedly the landlord’s “agent.” That is a red herring and turns the traditional landlord-tenant exception on its head by emasculating the key distinction between an incidental/ancillary activity versus one central to being “in the business” of a utility. 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. Because NEP supplies electricity to tenants as its primary business and independently takes actions to do so without direction from its “principal,” NEP clearly is a “public utility” under R.C. 4905.03(C).

There is yet 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. Consider, for instance, that an attorney licensed to practice law in Ohio 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.⁸ In the same way, landlords may be entitled to an exemption from regulation based on their special status as property owners 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. Nor can a contract authorize the agent to engage in regulated activity without being regulated.

The facts prove 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. Consistent with the original *Shroyer* test and the precedent of this Court, the Commission must examine each entity on its own, for what it does, and make a determination under the statute. The Commission should not have made a generic conclusion that ignores the evidence presented. If an animal looks like a duck, shares the DNA of a duck, walks like a duck, and quacks like a duck, it should not be denied that the creature is a duck. Likewise, because the evidence shows that NEP installs equipment needed to distribute and measure electricity like a utility, maintains and repairs that equipment like a utility, buys bulk power like a utility, distributes power to individual users like a utility, installs meters to measure individual tenant usage like a utility, sets rates to resell the power to customers like a utility, reads meters and sends bills based on each customer's usage like a utility, handles customer

⁸ As another example, a licensed doctor does not create additional licensed doctors by hiring agents; rather, anyone who practices medicine 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" (*see* R.C. 4723.151(A)), it is no defense that the nurse is the doctor's agent. Other examples abound.

service for each customer account like a utility and disconnects customers for non-payment like a utility, NEP must be considered a public utility. That NEP may have been an “agent” of landlords while doing all of those things should not provide a basis for thwarting the plain language and intent of R.C. 4905.03(C), as the Commission’s order does.

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.

As demonstrated above, the Commission failed to perform the required, case-by-case analysis based on the factual record and, instead, broadly relied on pre-*Wingo* caselaw to support the counter-factual conclusions that tenants are not consumers and that NEP is not engaged in the business of supplying electricity. Similarly, NEP’s categorical reliance on the landlord-tenant exception and its abuse of the principal-agent concept creates a mockery of the controlling statutory language. *Jonas* and its progeny addressed the “original” form of submetering involving a landlord itself, on its own property, merely dividing up the landlord’s electric costs among tenants (plus a reasonable administrative fee). And none of the pre-*Wingo* submetering decisions by this Court involved the conversion of existing utility consumers to submetering or third-party submetering companies using the new and emerging form of submetering recognized by the *Wingo* Court. NEP (and other Companies with similar business models) represent a new “third-party,” “big business” form of submetering in which a “third-party reseller,” at “multiple properties,” generates substantial profit by exploiting the difference between master-meter and residential rates. *Wingo*, 2020-Ohio-5583, ¶ 3. In short, the Court should either distinguish pre-

Wingo caselaw from the facts of this case involving big-business submetering or abandon the general judicially-created exception that lacks any connection to the statute without a record-specific application of the statutory language to the facts.

This Court first addressed submetering in *Jonas v. Swetland Co.*, 119 Ohio St. 12 (1928), a decision involving a very limited finding that a commercial landlord reselling electric service to its tenants was not a public utility. Submetering was not addressed again until 1965, when The Cleveland Electric Illuminating Company proposed a new tariff provision that would have prohibited submetering in shopping centers. Overturning the Commission finding that the shopping center was not a “customer,” this Court found that the Commission had jurisdiction over sales from the utility to a shopping center’s landlord, even when the landlord then resold that electric service to tenants. *Shopping Ctrs. Assn. v. Pub. Util. Comm.*, 3 Ohio St. 2d 1 (1965). Notably, *Shopping Centers* only addressed the definition of “electric light company” as it applied to a sale from the utility to a landlord. It did not address whether the landlord was an “electric light company” when it then resold electric service to its tenants.

The Commission did not first address that question until *Inscho v. Shroyer’s Mobile Homes* (“*Shroyer*”), PUCO No. 90-182-WS-CSS. The issue presented in *Shroyer* was whether a mobile home park owner was a “public utility” or a “water-works company” under R.C. 4905.02 and 4905.03 where it supplied water service to tenants of the park. To answer that question, the Commission devised a 3-prong test:

- (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 water services available to the general public rather than just to tenants residing in the manufactured home park?

- (3) Is the provision of water services ancillary to the primary business of operating a manufactured home park?

Shroyer, 1992 Ohio PUC LEXIS 137, *7-8 (Feb. 27, 1992). Applying this test, the Commission found that the mobile home park owner was not, in fact, a public utility or water-works company.

The *Shroyer* case, however, was not appealed to the Supreme Court and, consequently, the new three-part test was not reviewed by this Court until the *Pledger* case, in 2006, when the Court upheld a Commission decision that a mobile home park owner was not a public utility when it was providing water service to park tenants. *Pledger v. PUCO*, 2006-Ohio-2989. *Pledger* did not comprehensively sanction the *Shroyer* test but focused only on the third prong, which asked whether the provision of water services was ancillary to the landlord's primary business. *Id.* Like *Shopping Centers*, *Pledger* addressed the narrow question of whether the landlord was a "consumer" under R.C. 4905.03. *Id.*

In sum, *Jonas*, *Shroyer* and *Pledger* addressed the original, limited landlord exception to R.C. 4905.03 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. By contrast, as observed by this Court in *Wingo*, the key features of this new "third party," "big business" form of submetering, according to the Court, are (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. *Wingo*, 2020-Ohio-5583, at ¶ 3.

As the big-business, third-party submetering model began to grow, it garnered increased attention, and in 2015, the Commission was first presented with a case involving NEP – *In Re Complaint of Whitt v. Nationwide Energy Partners LLC*, PUCO No. 15-0697-EL-CSS. The Commission subsequently opened an investigation into submetering. *See In re the Commission’s Investigation of Submetering in the State of Ohio*, PUCO No. 15-1594-AU-COI. After receiving comments, the Commission decided to adopt a new jurisdictional test, the “modified *Shroyer* test,” which retained the original *Shroyer* test, but with modifications to the third prong. *Id.*, 2016 Ohio PUC LEXIS 1117, ¶ 16 (Dec. 7, 2016). The modified *Shroyer* test created a rebuttable presumption that a reseller *is* a public utility only if it charges a customer more for utility services than similarly-situated customer would pay under the Standard Service Offer. *Id.*, 2017 Ohio PUC LEXIS 547, at ¶ 49 (June 21, 2017).

After *Whitt* was voluntarily dismissed, a new complaint was filed by Cynthia Wingo (a tenant in an NEP building), alleging that NEP and other respondents were unlawfully operating as public utilities. *See In re Complaint of Wingo*, PUCO No. 17-2002-EL-CSS. Applying the modified *Shroyer* test, the Commission dismissed the *Wingo* complaint. On appeal, this Court held that the modified *Shroyer* test was invalid because it was “complete[ly] disconnect[ed] from the statutory language” in R.C. 4905.03(C). *Wingo*, at ¶ 17. The Court remanded *Wingo* to the Commission “to determine whether it has jurisdiction based upon the jurisdictional statute.” *Id.* at ¶ 26. However, the Commission dismissed *Wingo*, at the complainant’s request, without answering the jurisdictional question that this Court directed it to answer.

To the extent that the Court concludes that the facts here do somehow fall within the scope of the pre-*Wingo* caselaw, the Court should consider abandoning the landlord-tenant exception to R.C. 4905.02(C) found in that caselaw. Applying that judicially-created exception to support a general conclusion that third-party submetering companies are beyond the scope of the Commission’s jurisdiction is not grounded in the controlling statutory language, especially where the Commission reaches a result that is contrary to the evidence and the plain meaning of the statute. A case-by-case factual application of the statutory language could certainly yield the result of the pre-*Wingo* caselaw for instances where a landlord merely *resells electricity as an incidental activity related to its primary function as a landlord*. But the Commission’s categorical application of the same caselaw to NEP (despite the contrary directives in *Wingo*) and glossing over the vastly different facts presented below regarding NEP’s course of conduct as a utility cannot stand.

Proposition of Law No. 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*..

Despite finding it had no jurisdiction over NEP, the Commission manufactured a solution (unveiled for the first time in its merit decision) to protect master-metered residential tenants by requiring AEP Ohio to issue tariffs mandating:

- (1) Landlord’s lease agreements contain a notice of certain size and font that the tenant agrees to have the landlord secure and resell electricity and that 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.
- (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; and

(3) [NEP] or the landlord must follow the same disconnect standards applicable to landlords under Ohio Adm.Code Chapter 4901:1-18.

(Opinion and Order at ¶ 224, OPC Appx. 113-114.) (collectively referred to as “Tariff Directive”). In doing so, the Commission disregarded this Court’s express holdings in *Wingo*, exceeded its statutory jurisdiction, and imposed requirements without due process and improperly amended and expanded its rules.

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.

This Court has confirmed that the Commission should have no part in regulating submetering rates to prevent harm if it does not first find that it has jurisdiction. *Wingo*, 2020-Ohio-5583, at ¶ 23 (stating “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.” (emphasis added)). But the Commission has done exactly that by finding that it “does not have jurisdiction to regulate NEP” (Opinion and Order at ¶ 179, OPC Appx. 87), while simultaneously imposing “conditions on the resale of electric service from a landlord to a tenant that a landlord must follow.” (Opinion and Order at ¶ 224, OPC Appx. 113.) Those conditions include a recycling of the same price test that this Court struck down in *Wingo*. The Court should protect its precedent and reverse and remand the Commission’s decision that implements price protections for entities over which it has expressly disclaimed jurisdiction.

In *Wingo*, the Commission was faced with determining whether it had jurisdiction to rule on a complaint brought against NEP (and others) for submetering practices involving the resale or redistribution of public utility services. *Wingo*, 2020-Ohio-5583, at ¶ 3. While the Commission had previously employed the *Shroyer* test to determine whether it had jurisdiction over such matters, in *Wingo*, the Commission adopted two modifications to the *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) allowing a reseller to “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. at ¶ 13. This “SSO Price Test,” as it was later called, became the basis of the modified *Shroyer* Test, which the Commission applied to find that NEP was not a public utility. *Id.* at ¶ 5.

This Court reversed, holding that the modified *Shroyer* test was not based upon the jurisdictional statute, R.C. 4905.03. *Id.* at ¶ 26. The Court reminded the Commission that “where jurisdiction is dependent upon a statutory grant, that power resides with the General Assembly, . . . not the PUCO.” *Id.* at ¶¶ 19, 24. The Court made clear that nothing authorizes the PUCO to write its own jurisdictional rules, and by “applying its modified *Shroyer* test, the PUCO is making a policy judgment about who it wants to regulate.” *Id.* at ¶¶ 21, 22.

Here, the Commission has again instituted the “SSO Price Test,” even as it claimed to be applying the *Wingo* decision that vacated the same test. 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.” (Opinion and Order at ¶ 224, OPC Appx. 113.) Astonishingly, however, the Commission went 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.*) Despite AEP Ohio raising concerns about this issue in its

Application for Rehearing, the Commission never addresses or otherwise contests that it recycling the same “SSO Price Test” that this Court rejected less than four years ago in *Wingo*.

Under the Commission’s ruling, if a landlord or submetering company charges more than the SSO (and violates the tariffs that AEP Ohio has been ordered to establish) the landlord or submetering company can presumably be brought before the Commission. This is precisely the same paradigm that the Court struck down in *Wingo*: the SSO Price Test “is saying, “*as long as you don’t charge too much (as measured by default-service-tariff rates), we will leave you alone. . . . But cross that price line, and you are subject to our jurisdiction and our rules.*” *Wingo* at ¶ 22 (emphasis in original). It also contradicts the Court’s direction that the Commission 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. *Id.* at ¶ 23. The Commission’s disregard for the *Wingo* vacatur of the SSO Price Test 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.

Once the Commission (incorrectly) concluded that neither NEP nor landlords are “electric light companies” under R.C. 4905.03(C), or otherwise “public utilities,” the Commission ceased having any jurisdiction to regulate them. The Commission’s powers are limited to those conferred by the General Assembly. And the Commission is vested with the power to supervise and regulate *public utilities*. R.C. 4905.04. The Court has been clear and consistent about this standard for decades – “the General Assembly has vested the PUCO with the “power and jurisdiction to supervise and regulate public utilities . . . [t]he PUCO ‘has no authority to act beyond its statutory powers.’” *Wingo* at ¶ 8, citing R.C. 4905.04; *Discount Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53, ¶ 51. Quite simply, the Commission either has

jurisdiction conferred by the General Assembly, or it does not. Yet the Commission’s Tariff Directive blurs this very clear line: it creates a weak substitute for regulation of third-party companies like NEP who submeter and resell electric service to tenants, despite the Commission having found that it has no jurisdiction or power to regulate those entities. (Opinion and Order at ¶ 224, OPC Appx. 113.)

The Commission attempts to explain away this exercise of disclaiming jurisdiction while imposing regulations to protect residential tenants from the unregulated industry by citing what the Commission believes to be a plenary power to require AEP Ohio “to put appropriate restrictions in a tariff as conditions to receive service pursuant to that tariff.” (Sec. Entry on Rehr. at 36, OPC Appx. 182.) In doing so, 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, OPC Appx. 114 (emphasis added).) Specifically, the Commission cites to its past practice of establishing consumer protections associated with gas choice regulation as well as regulations around interconnections. (*Id.*; *see also* Sec. Entry on Rehr. at ¶ 36, OPC Appx. 182.) But such analysis is 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, OPC Appx. 90 (emphasis added).) Further, providing regulated protections to customers of regulated utilities is far different from requiring regulated utilities to provide protections to customers of unregulated third parties like NEP. The Tariff Directive imposes “utility-like” regulations that put AEP Ohio in the position of governing how much an unregulated third-party may charge for electricity, or how that unregulated third-party may disconnect electricity.

Moreover, the Commission’s rationale contradicts its own recent precedent. In 2020, the Commission opened an investigation into whether operators of electric vehicle charging services (“EVSC”) qualify as public utilities engaged in the business of supplying electricity. After finding that EVSC operators are *not* public utilities under the *Shroyer* test, the Commission declined to adopt consumer protections proposed by various parties, recognizing that its jurisdiction was limited by statute. *In the Matter of the Commission’s Investigation into Electric Vehicle Charging Service in the State*, PUCO No. 20-434-EL-COI, Finding and Order at ¶¶ 29, 32, 2020 WL 4819798 (July 1, 2020). Indeed, the Commission expressly found that its “determination [that] EVCS operators [are not public utilities subject to the jurisdiction of the PUCO] . . . functions to limit the oversight we can provide.” *Id.* at ¶ 32. The Commission erred when it departed from that same logic in this case – disclaiming jurisdiction, on the one hand, but then proceeding on the other hand to require certain consumer protections that are not legally proper or enforceable under the Commission’s own analysis.

For these reasons, the Commission exceeded its statutory jurisdiction when it chose to impose regulations on the reselling industry through AEP Ohio via the Tariff Directive.

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.

Neither AEP Ohio nor NEP advocated for or otherwise commented on the Commission-created Tariff Directive, which was not discussed anywhere in the record before the Commission unilaterally unveiled the idea in its Opinion and Order. As such, the requirements of R.C. 4903.09 are not met and there is no record evidence to support that the Tariff Directive will

actually protect customers, as the Commission intends, or that it is workable, lawful or enforceable. More importantly, AEP Ohio and other interested parties were deprived of the opportunity to be heard or provide evidence on the impacts of the Tariff Directive. The Commission's Order deprived countless other customers and stakeholders from being heard before *sua sponte* issuing its Tariff Directive, which purports to make sweeping changes to the resale of electricity and landlord/tenant relationships in Ohio. AEP Ohio's tariffs are applicable to all customers and there is a statutory process for updating tariffs, R.C. 4909.18 (OPC Appx. 230-231), which requires a public filing and subsequent determination by the Commission in an open proceeding – none of which happened here.

Ohio and federal courts of the highest power have long recognized that due process requires those parties that have the potential to be impacted by a government action to be notified and given an opportunity to be heard. *In Re Thompkins*, 2007-Ohio 5238, ¶ 13, citing *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708 (1884); *Caldwell v. Carthage*, 49 Ohio St. 334, 348 (1892). Yet, no third-party submetering entity or landlord had notice or an opportunity to be heard regarding the Commission's Tariff Directive, as they were not parties to this action. Indeed, there was no notice to even the parties to this action, as the Tariff Directive was first raised by the Commission in its Opinion and Order *sua sponte*.

But unlike a rule review or commission-ordered investigation (or even a complaint case where the concepts set forth in the Tariff Directive were at issue) where the Commission invites comments and input *before* making a substantive ruling, the Commission has already made a determination of what is to be included in the tariffs. The tariff filing is a formality to effectuate the substance of the Opinion and Order. Having an opportunity to be heard on proposed tariffs that must be filed to meet an existing mandate is different from having an opportunity to be heard

on whether the tariffs should be imposed at all. Even AEP Ohio did not have an opportunity to comment on whether the Tariff Directive would protect the customers as intended or is a feasible solution to the issues identified by the Commission – because the Commission created the idea and adopted it without any advance notice or opportunity to comment. As such, the tariff proceeding in Case No. 24-106-EL-ATA is not a sufficient or meaningful opportunity to be heard to meet the requirements of *Thompkins* and should be reversed accordingly.

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.

In addition to its failure to meet the requirements of *Thompkins*, the Commission bypassed the required process for amending its rules because the Tariff Directive is the functional equivalent of instituting new regulations, as evidenced by the Commission’s numerous admissions alluding to this having statewide implications. In its Opinion and Order, the Commission acknowledged 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, OPC Appx. 113.) Because this was a complaint case involving AEP Ohio, the Commission has only ordered that AEP Ohio amend its tariffs to conform with the Tariff Directive, which will only be applicable to landlords and submetering companies that do business in the AEP Ohio service territory. (Opinion and Order ¶ 224, OPC Appx. 113.) But, on rehearing, the Commission expressed its “expect[ation] 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.” (Sec. Entry on Rehr. ¶ 36,

OPC Appx. 183.) Indeed, the FirstEnergy Utilities⁹ saw fit to file their own tariff in response to the Commissions’ order in this case despite having no involvement in the proceeding below, demonstrating the sweeping nature of the conclusions in what was supposed to be a finite case. *See In Re the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Tariff Amendments*, PUCO No. 24-55-EL-ATA, Application for Approval of Tariff Amendments (January 25, 2024). It is clear from the Commission’s own analysis that the Tariff Directive imposes requirements appropriate for a rulemaking.

Even if there is doubt that the lease notice and SSO Price Test are rule amendments (even though they are the functional equivalent of new rules), there is no doubt that the Commission is expressly amending Adm.Code 4901:1-18 by requiring that “landlord[s] must follow the same disconnect standards applicable to landlords under 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, OPC Appx. 114.) But the Commission failed to follow the robust statutory procedures that are required to amend its rules.

The 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.” *Fairfield Cty. Bd. of Commrs. v. Nally*, 2015-Ohio-991, ¶ 36. Yet 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 (OPC Appx. 205-212); *see also Nally*, 2015-Ohio-991, ¶ 36. Nor did the Commission perform a

⁹ First Energy Utilities” refers collectively to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

mandatory 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 (OPC Appx. 213-214). 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, which would enable the opportunity for a legislative oversight hearing. *See* R.C. 106.02 (OPC Appx. 191); R.C. 111.15(D) (OPC Appx. 202-204). Nor is there any indication that the Commission performed the requisite fiscal analysis for submission to JCARR. R.C. 106.024(B) & (C) (OPC Appx. 195-197; R.C. 111.15(D) (OPC Appx. 202-204). R.C. 106.021 also allows JCARR to “recommend to the senate and house of representatives the adoption of a concurrent resolution to invalidate [a] proposed rule” for various reasons, including that “[t]he proposed rule . . . exceeds the scope of its statutory authority.” (OPC Appx. 193-194.) By skirting the rulemaking process under the guise of the Tariff Directive, the Commission evaded review not only by JCARR but also the Governor’s Common Sense Initiative office. R.C. 107.57(A) (OPC Appx. 198).

To support its position that the Tariff Directive is not “some sort of ad hoc rulemaking,” the Commission asserts that “[i]t 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.” (Sec. Entry on Rehr. at ¶ 36, OPC Appx. 183.) But the Commission cites no statute or Supreme Court precedent to support this asserted power. Instead, the Commission harkens back to its own decision in a 1990 complaint case that the Ohio Consumers’ Counsel (“OCC”) brought against the Dayton Power and Light Company (“DP&L”). (Sec. Entry on Rehr. at ¶ 36, OPC Appx. 183; citing *In Re the Complaint of the Office of the Ohio Consumers’ Counsel v. Dayton Power and Light Company* (“OCC v. DP&L”),

PUCO No. 90-455-GE-CSS, Opinion and Order, 1990 Ohio PUC LEXIS 1145 (Oct. 18. 1990.)

The Commission's reliance upon this vintage case is telling. In that case, OCC alleged that DP&L arbitrarily charged an "investigation charge" when the utility conducted an investigation into alleged fraudulent conduct of a customer. Unlike this matter involving a unique business model of a single reselling entity (NEP), OCC is the statutory representative for *all* residential utility customers. *See* R.C. 4911.02 (OPC Appx. 232). Moreover, the *OCC v. DP&L* matter was resolved via Stipulation; as such, the Commission was simply approving DP&L's request to amend its tariffs, as set forth in an agreement to address OCC's concerns about investigation costs that are applicable to the residential customers that the regulated utility directly serves. Neither the *OCC v. DP&L* case, any Supreme Court precedent, nor any statutes bestow the Commission with the power to issue rules disguised as tariffs. As such, the Commission's Tariff Directive should be reversed and remanded with instructions for the Commission to follow the appropriate procedures, to the extent the Commission even has jurisdiction to issue such rules.

Proposition of Law No. III: The Commission's "narrow and limited" ruling in favor of NEP's Counterclaim is an unreasonable and unlawful application of the complaint case statute, R.C. 4905.26..

The Commission determined that NEP "met its burden of proof" under 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." (Sec. Entry on Rehr. at ¶ 30, OPC Appx. 178.) In addition to being unfair and conflicting with many other findings in the Commission's order, the Commission improperly relied upon R.C. 4905.26 to retrospectively create a "violation," since that statute is purely jurisdictional and procedural in nature and does not itself impose a substantive obligation on

utilities. (*Id.* at ¶ 29, OPC Appx. 178.) Of course, if this Court agrees with AEP Ohio’s first assignment of error and holds that NEP is operating as a public utility, then the Court can summarily resolve this third assignment of error in AEP Ohio’s favor, as it would not have been unlawful or unreasonable for AEP Ohio to refuse the requested conversions to facilitate unlawful resale. For the following reasons, however, regardless of the Court’s resolution of AEP Ohio’s other assignments of error, the Commission’s finding that AEP Ohio “violated” R.C. 4905.26 is unreasonable and unlawful.

A. The complaint-case statute, R.C. 4905.26, is a jurisdictional and procedural mechanism, and does not provide an independent standard that a utility can “violate.”

R.C. 4905.26 endows the Commission with *jurisdiction* to hear complaints against utilities for unjust or unreasonable service. (OPC Appx. 226.) It also sets forth the *procedure* by which the Commission may find reasonable grounds for a complaint, fix a time for hearing, and provide adequate notice of same. (*Id.*) What the complaint-case statute does *not* do is impose an independent, substantive standard that a utility can “violate.”

Other statutes in Title 49 do impose standards on public utilities. R.C. 4905.22 requires them to furnish such service and facilities as are “necessary and adequate” and “just and reasonable”; requires utilities’ service charges to be “just” and “reasonable”; and prohibits utilities from charging “more than [what is] allowed by law or . . . the public utilities commission” *Id.* (OPC Appx. 225.) R.C. 4905.35(A) prohibits them from “giv[ing] any undue or unreasonable preference or advantage to any person” or “subject[ing] any person . . . to any undue or unreasonable prejudice or disadvantage.” *Id.* (OPC Appx. 227.) And R.C. 4905.26 does allow “any . . . corporation” to file a complaint if it believes a utility’s services or charges violate the substantive standards imposed by R.C. 4905.22 and 4905.35(A) – for example, if they

believe “any service is . . . inadequate or cannot be obtained,” or that a charge is “unjust, unreasonable, . . . or in violation of law . . . ” R.C. 4905.26 (OPC Appx. 226.) If the Commission agrees “after hearing . . . that that the rules, regulations, measurements, or practices of any public utility with respect to its public service are unjust or unreasonable,” then the Commission must “determine the . . . practices . . . to be . . . observed” and then “fix and prescribe them by order . . . ” R.C. 4905.37 (OPC Appx. 228.) In other words, the filing of a complaint case can lead to the issuance of a remedial Commission order that, *from that point forward*, requires the public utility to engage in or abstain from some practice.

Here, however, the Commission incorrectly interpreted R.C. 4905.26 to provide an independent source of substantive duties and obligations that AEP Ohio could violate, instead of merely creating a procedural vehicle to enforce another statute that either establishes those substantive obligations or allows the Commission to establish those substantive obligations. In doing so, the Commission mis-applied the complaint-case statute, and in doing so, deviated from the Commission’s own precedent, as well as precedent from this Court.

1. The Commission and its Attorney Examiners have previously and correctly deemed the complaint-case statute to be procedural and non-substantive.

The Commission’s interpretation of the complaint-case statute as a source of substantive rights conflicts with Commission’s precedent. In 1979, the Commission held, correctly, that R.C. 4905.26 “operates as the *procedural* vehicle for bringing [a] complaint before this Commission.” *In the Matter of Richard Ihlendorf v. The Cincinnati Gas and Electric Co.*, PUCO No. 77-862-GE-CSS, Entry on Rehrq. at 2 (Feb. 14, 1979) (emphasis added). That description of R.C. 4905.26 was consistent with then-recent precedent from this Court, *Ohio Pub. Interest Action Grp., Inc. v. Pub. Util. Comm.*, 43 Ohio St.2d 175 (1975). In that opinion,

this Court noted that the complaint-case statute “sets out a *procedure* for the commission to investigate the matters therein enumerated.” *Id.* at 180 (emphasis added). In the same paragraph, this Court confirmed the non-substantive nature of the complaint-case statute, noting that it “does not constitute a ‘law’ or ‘rule’ restricting advertising by utilities *** [.]” *Id.*

More recently, an Attorney Examiner at the Commission again held that “the language in Section 4905.26, Revised Code, is entirely procedural in nature. It explains what types of claims may be made in a complaint and, procedurally, how the Commission shall assert its jurisdiction.” *In re Allianz US Global Risk Ins. Co. v. FirstEnergy Corp.*, PUCO No. 05-1011-EL-CSS, Entry ¶ 34, 2006 Ohio PUC LEXIS 463 (Aug. 7, 2006). *Allianz* arose out of the significant blackout that occurred in the northeastern United States and southeastern part of Canada in August 2003. The complainants in *Allianz* sued American Transmission Systems, Incorporated (“ATSI”), among others, for inadequate service under R.C. 4905.22 and a separate claim under the complaint-case statute, R.C. 4905.26. The Attorney Examiner in *Allianz* granted a motion to dismiss that was filed by ATSI arguing that R.C. 4905.26 merely establishes the *procedure* for complaints and 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.” *Id.* (Emphasis added).

Ihlendorf and *Allianz* were correct, and the Commission’s attempts to get around them on rehearing here fall short. In response to AEP Ohio’s reliance upon the Attorney Examiner’s on-point discussion in *Allianz*, the Commission cites the “precedential value” of its prior Entry on Rehearing in *In re the Complaint of Sprint Communications Co. L.P. v. Ameritech Ohio*, PUCO No. 96-142-TP-CSS. A review of the Commission’s Order in *Sprint*, however, confirms that it has no application here. *Sprint*’s detailed ten-page “Discussion and Conclusion” *nowhere*

mentions R.C. 4905.26 as the substantive basis for any relief ordered by the Commission in that case. *See id.*, Opinion and Order at 25-35, 1997 Ohio PUC LEXIS 660 (Sept. 11, 1997).

Instead, the Commission’s discussion confirms that the Commission’s determination against Ameritech was based not upon any alleged “violation” of the complaint-case statute, but rather upon violations of R.C. 4905.35, which prohibits public utilities from giving undue or unreasonable advantages to any person. *Id.* at 28. Given the Commission’s express reliance upon the substantive prohibition in R.C. 4905.35, it is not surprising that on rehearing in *Sprint*, when Ameritech argued that R.C. 4905.26 did not create an independent basis for liability, the Commission handily dismissed this argument, having expressly relied upon R.C. 4905.35 – not the complaint-case statute – for its decision. *Id.*, Entry on Rehr. at ¶ 14. Here, the Commission has doubled down on its erroneous contention that utilities can “violate” the purely procedural complaint-case statute.

2. This Court has acknowledged the difference between procedural laws such as R.C. 4905.26 and substantive laws that impose affirmative duties or obligations.

The Commission’s improper application of R.C. 4905.26 as a source of substantive rights also conflicts with precedent from this Court, which has properly recognized and applied the fundamental distinction between remedial and substantive laws. As noted above, this Court has previously described R.C. 4905.26 as “procedural,” and in doing so expressly distinguished the complaint-case statute from any “law” or “rule” imposing substantive restrictions upon utilities. *Ohio Pub. Interest Action Grp.*, *supra*, 43 Ohio St.2d at 180.

This Court has recognized this critical procedural-versus-substantive distinction in other contexts as well. For example, in *Ackison v. Anchor Packing Co.*, the Court found that R.C. 2505.34 does not vest an appellate court with jurisdiction to determine substantive rights by

relying upon its own precedent to note that statutes pertaining merely to the “machinery for carrying on a suit” are “procedural in nature, not substantive” for purposes of a claim under the Ohio Constitution’s retroactivity clause. *Id.*, 2008-Ohio-5243, ¶ 16; *see also Cotofan v. Steiner*, 170 Ohio St. 163 (1959), paragraph two of the syllabus. Here, the complaint-case statute indeed establishes the “machinery for carrying on a suit” at the Commission, but imposes no substantive duties upon AEP Ohio that it can “violate.”

The Commission’s conclusions on rehearing here, that R.C. 4905.26 is not a purely procedural statute (Sec. Entry on Rehr. at ¶ 29, OPC Appx. 178) and that NEP “met its burden of proof pursuant to R.C. 4905.26” (*id.* at ¶ 30, OPC Appx. 178), should be reversed as lacking any basis in R.C. 4905.26 and conflicting with the foregoing precedent. Nor does the Commission’s alternative reliance upon R.C. 4905.37 (*id.*) as the basis for “reaching the same result” (*id.*) solve the problem. Although that statute enables some prospective remedies in the context of a R.C. 4905.26 complaint case, the Commission cannot use that remedial statute as a basis to conclude that R.C. 4905.26 was “violated” or to support its finding that an obligation that did not previously exist was violated.

B. It is unreasonable for the Commission to fault AEP Ohio for its actions following dismissal of the complaint in *Wingo*, 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.

In Paragraph 262 of its Opinion and Order, the Commission acknowledges that it was “*not unreasonable* for AEP Ohio to pause the conversion request for the Apartment Complexes in order to await further Commission guidance,” yet in the same paragraph finds, paradoxically, that AEP Ohio violated R.C. 4905.26 in doing so. (Opinion & Order, ¶ 262, OPC Appx. 133-34 (emphasis added).) Later, the Commission acknowledges that AEP Ohio’s practice of declining

to provide master-metered service to the Apartment Complexes “was not just and reasonable” even though it may have been “*undertaken in good faith.*” (Sec. Entry on Rehrgr. ¶ 29, OPC Appx. 178 (emphasis added).) As AEP Ohio demonstrated in its Application for Rehearing, in no less than half-a-dozen places in the Commission’s Opinion and Order and in the concurring opinion of Commissioner Conway, the Commissioners repeatedly found that AEP Ohio’s actions in pausing conversions were not unreasonable, and these findings all undercut the Commission’s Paragraph 262 finding that AEP Ohio acted unreasonably or unlawfully. (AEP Ohio App. for Rehearing at 25 (Oct. 6, 2023) *citing* Opinion & Order, ¶¶ 88, 256, 278, 281, 287, Separate Opinion of Commissioner Conway ¶ 3, OPC Appx. 163; *see also id.* ¶¶ 8-9, OPC Appx. 165.) This Court should reverse the Commission’s internally contradictory findings that AEP Ohio acted in any way unjustly or unreasonably.

As a threshold matter, the Terms and Conditions of the AEP Ohio’s tariffs (in Section 18) only allow resale activities permitted by Ohio law and (in Section 26) also permit AEP Ohio to refuse service if a nonresidential customer is doing something unlawful. (NEP Ex. 4, at 9, OPC Supp. 344.) Against this background, this Court’s *Wingo* decision and the subsequent dismissal of the *Wingo* complaint on remand left AEP Ohio without specific guidance as to NEP’s status as a public utility. After the Commission dismissed the *Wingo* complaint on remand, when there was no other Commission investigation or rulemaking pending, AEP Ohio was forced to decide how to interpret the “unlawful resale” portion of its tariffs. This situation demanded that AEP Ohio scrutinize the factual and legal analysis of NEP’s request for the conversions to master-meter service, which AEP Ohio’s legal counsel promptly communicated to NEP the day after the *Wingo* decision was issued. (NEP Ex. 90. at 28, OPC Supp. 386.) Whatever decision AEP Ohio made after the Court’s *Wingo* remand and the subsequent dismissal of *Wingo*’s complaint would

have been problematic. AEP Ohio could have unilaterally abandoned its customers at the Apartment Complexes to NEP, or it could have denied NEP’s conversion request. AEP Ohio took the latter approach *and* then immediately filed a complaint case to obtain the Commission’s guidance, to protect the customers in its service territory and preserve the *status quo* for adjudication. If AEP Ohio had gone ahead with the master-meter conversions, the Commission likely would have had no opportunity to address the uncertainties surrounding NEP’s submetering practices unless a complaint was filed by a tenant. In sum, AEP Ohio acted reasonably and in good faith after this Court’s *Wingo* remand to deny NEP’s conversion requests, and the Commission’s conclusion otherwise – a conclusion contradicted by its own express findings – is unlawful and unreasonable.

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.

Before the Commission’s decision in this case, nothing in R.C. Chapter 49 or the Commission’s regulations prohibited AEP Ohio or any other EDU from declining to convert existing apartments to master-meter service if the apartment owners utilize third-party submetering companies like NEP. The Commission’s decision here is the first time that the Commission has ever determined that such a practice is (in its view) unreasonable. AEP Ohio simply could not have known in June 2021 – when it denied NEP’s requested conversions – that refusing the conversions would be retrospectively deemed unlawful two years later, in the Commission’s 2023 Opinion and Order. When AEP Ohio declined the requested conversions, AEP Ohio had very good reason to believe that its policy was *fully in line* with *Wingo*.

As this Court has noted, it is unreasonable and unlawful – indeed, unconstitutional – for an adjudicatory body like the Commission to find a “violation” of a law or rule that did not exist at the time of the conduct in question, because that form of adjudication undermines the fair-

notice requirement of due process. In *City of Norwood v. Horney*, for example, the Court noted that “[d]ue process demands that the state provide meaningful standards in its laws. A law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed if that law is breached.” 2006-Ohio-3799, ¶ 81. In *Norwood*, this Court also held that a statute is void for vagueness where 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.” *Id.* at ¶¶ 86-87. This Court is hardly the only one to prevent inequitable, retroactive application of standards against those lacking fair notice. *E.g.*, *Air Transp. Assn. v. CAB*, 732 F.2d 219 (D.C. Cir. 1994) (Aeronautics Board’s refund policy for fees paid since 1977 had unlawful retroactive effect because it effectively imposed on the carriers obligations that did not exist when the fees originally were paid, which was tantamount to retroactive rulemaking and destructive of the carriers’ justifiable reliance on the fee schedule as it previously read); *Drug Package, Inc. v. NLRB*, 570 F.2d 1340, 1346 (8th Cir. 1978) (“Only if an earlier duty to bargain existed and was violated may the Board impose a bargaining order retroactively.”).

Adding injury to insult, the “violation” finding exposes AEP Ohio to potential treble damages for an action that the Commission had not previously found to be unlawful creates additional constitutional concerns. R.C. 4905.61. Under that statute, an injured 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 somehow “violated R.C. 4905.26” may allow NEP to pursue treble damages in state court. That would be fundamentally unfair and that is why this Court has

required that “[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).

The General Assembly imposed an analogous requirement on actions for treble damages under the Consumer Sales Practices Act (“CSPA”), which says “[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction.” R.C. 1345.02(A) (OPC Appx. 215.) If a supplier violates this statute, a consumer may sue to recover damages. R.C. 1345.09(A) (OPC Appx. 218.) But treble damages 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) (OPC Appx. 218.)

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 only makes sense: penalties cannot deter action that no public utility knows is a regulatory violation. It is unequivocally unjust to penalize an action simultaneously with the first determination that the action is prohibited. Here, nothing in R.C. Title 49 or the Commission’s regulations 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 final decision here is the first time it 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 it was fully in line with *Wingo*. See Opinion and Order ¶ 256, OPC Appx. 130 (“there was a genuine outstanding question as to whether NEP would be deemed to be operating as a public utility at the Apartment

Complexes”). Indeed, the dismissal of *Wingo* on remand resulted in no determination or guidance on that unprecedented issue until the case below was decided. Finding that AEP Ohio’s policy nonetheless violated R.C. 4905.26 and exposing AEP Ohio to a potential suit for penalties under R.C. 4905.61, violates due process and is unlawful and unreasonable.

CONCLUSION

For the foregoing reasons, Appellant Ohio Power Company respectfully asks this Court to reverse the unreasonable and unlawful decision of the Commission.

Respectfully submitted,



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