Case No. 2024-0207

In the Supreme Court of Ohio

On Appeal from
The Public Utilities Commission of Ohio
Case No. 21-990-EL-CSS

In the Matter of the Complaint of Ohio Power Company

v.

Nationwide Energy Partners, LLC

BRIEF OF AMICUS CURIAE, OHIO PARTNERS FOR AFFORDABLE ENERGY, IN SUPPORT OF THE POSITION OF APPELLANT OHIO POWER COMPANY

Robert Dove (0092019)
Kegler Brown Hill & Ritter Co. LPA
65 East State Street, Suite 1800
Columbus, OH, 43215
614-462-5443
rdove@keglerbrown.com

Counsel for Amicus,
Ohio Partners for Affordable Energy

David Yost (0056290)
Attorney General of Ohio

John Jones (0051913)
Section Chief, Public Utilities
Assistant Attorney General
Public Utilities Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215
Tel: 614-466-4397
Fax: 614-466-8764
John.jones@ohioago.gov

Counsel for Appellee,
Public Utilities Commission of Ohio

Steven T. Nourse (0046705)
Counsel of Record
Michael J. Schuler (0082390)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
Tel (Nourse): 614-716-1608
Tel (Schuler): 614-716-2928
stnourse@aep.com
mjschuler@aep.com

Matthew S. McKenzie (0091875)
M.S. McKenzie Ltd.
P.O. Box 12075 Columbus, Ohio 43212
Telephone: (614) 592-6425
matthew@msmckenzieltd.com

L. Bradfield Hughes (0070997)
Eric B. Gallon (0071465)
Porter, Wright, Morris & Arthur, LLP
41 S. High Street, Ste. 3000
Columbus, Ohio 43215
Tel: (614) 227-2053 (Hughes)
Tel: (614) 227-2190 (Gallon)
bhughes@porterwright.com
egallon@porterwright.com

Counsel for Appellant,
Ohio Power Company

Michael J. Settineri (0073369)
Counsel of Record
Andrew P. Guran (0090649)
Anna Sanyal (0089269)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
mjsettineri@vorys.com
apguran@vorys.com
aasanyal@vorys.com

Drew B. Romig (0088519)
Nationwide Energy Partners, LLC
Associate General Counsel
230 West Street, Suite 150
Columbus, OH 43215
Tel: 330-418-6606
dromig@nationwideenergypartners.com

Counsel for Intervening Appellee,
Nationwide Energy Partners, LLC

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Amicus curiae Ohio Partners for Affordable Energy ("OPAE") supports the Ohio Power Company ("AEP Ohio") in seeking to reverse the Public Utilities Commission of Ohio ("Commission")'s decision in the underlying proceeding which held that submetering companies such as Nationwide Energy Partners ("NEP") act as agents of landlords and therefore are not operating as electric light companies. OPAE writes separately to stress the importance of this decision to low-income customers.

A low-income customer who rents their home or apartment served by AEP Ohio receives numerous protections and services meant to assist them in keeping their utility service active. These protections include payment plans, the percentage of income payment program, weatherization services, fuel fund and bill payment assistance programs, Commission oversight and minimum service requirements among others. However, a low-income tenant of a submetered housing complex loses many of these programs and protections because they are no longer customers of a public utility and no longer have the protections of Commission oversight.

This proceeding presented the Commission with an opportunity to reverse that loss of protections in the modern submetering context. This Court recognized in *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617 (2020) ("*Wingo*") that modern submetering companies - like NEP - were not contemplated by the prior case law on submetering. Instead of seizing this opportunity to follow the guidance provided by this Court in *Wingo* and update the Commission's approach to submetering to reflect the realities of the current submetering industry, the Commission ignored the Court's guidance and issued an Opinion and Order full of contradictions that conflates the role of landlord and modern submetering entities.

INTERESTS OF AMICI CURIAE OPAE

OPAE is an Ohio non-profit corporation with a stated purpose of advocating for affordable energy policies for low-and moderate-income Ohioans. OPAE includes, as members non-profit organizations located within AEP Ohio's service territory. Moreover, many of OPAE's members are Community Action Agencies. Under the federal legislation authorizing the creation and funding of these agencies, originally known as the Economic Opportunity Act of 1964, Community Action Agencies are charged with advocating for low-income residents of their communities.

OPAE has a long history of engaging in advocacy on behalf of low-to moderate income Ohioans before the Commission and, when necessary, this Court. OPAE has concerns that the Commission's decision, which is not logically consistent, fails to protect low-income Ohioans. Specifically, the Commission's decision stripped certain tenants of the rights under Ohio law without record support. Further, the impact of the Commission's decision stretches far beyond the tenants of apartment complexes at issue and opens up all low-income Ohioans who rent to both the loss of their statutory rights as well as their homes. OPAE submits this *Amicus Curiae* respectfully requesting the Court reverse and remand the Commission's decision that submetering entities are not electric light companies and therefore not subject to Commission jurisdiction.

FACTUAL BACKGROUND

OPAE incorporates Appellant AEP Ohio's Statement of Facts.

STANDARD OF REVIEW

Revised Code 4903.13 provides that "[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon

consideration of the record, such court is of the opinion that such order was unlawful or unreasonable." This Court "has complete and independent power of review as to all questions of law." *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997). Further, on issues of statutory interpretation this Court held:

> [I]t is the role of the judiciary, not administrative agencies, to make the ultimate determination about what the law means. Thus, the judicial branch is never required to defer to an agency's interpretation of the law. As we explain, an agency interpretation is simply one consideration a court may sometimes take into account in rendering the court's own independent judgment as to what the law is. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 172 Ohio St.3d 225, 2022-Ohio-4677, ¶3.

With respect to questions of fact, the Court "will not reverse an order of the commission absent a showing that it is manifestly against the weight of the evidence, and is so unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *City of Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 528-529, 620 N.E.2d 826 (1993) (citing *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 268, 527 N.E.2d 777 (1988)).

Revised Code 4903.09 requires the Commission to provide, in all contested cases, a record that includes "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Supreme Court of Ohio has explained that R.C. 4903.09 means that "the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987). In fact, "[a] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 (citations and

internal quotation marks omitted). The Supreme Court of Ohio has previously reversed PUCO decisions under R.C. 4903.09 where a party shows: "first, that the commission initially failed to explain a material matter; second, that [the appellant] brought that failure to the commission's attention through an application for rehearing; and third, that the commission still failed to explain itself." *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, 148 Ohio St. 3d 510, 2016-Ohio-7535, 71 N.E.3d 997, ¶19 (citation omitted).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. Proposition of Law I (AEP Ohio Proposition of Law III): The Commission's Application of the Jurisdictional Statute, R.C. 4905.03(C) to NEP is Unreasonable and Unlawful and Against the Manifest Weight of the Evidence.

In this proceeding the Commission was provided with a fresh opportunity to apply the directive this Court gave the Commission in its decision in *Wingo*. In *Wingo,* the Court reversed and remanded a Commission decision on a different set of facts that determined NEP was not an electric light company and therefore not a public utility by the application of a Commission created and later modified test known as the *Shroyer* test. *Wingo* ¶26. This Court directed the Commission to reevaluate the facts using the statutory language provided in R.C. 4905.03. *Id*. However, after the remand, the original complainant in that proceeding dismissed her complaint before the Commission could implement the Court's directive.

This proceeding provided the opportunity for the Commission to implement that directive in determining whether the very same company, NEP, engaged in the same activity, is an electric light company in the business of supplying electricity for light, heat, or power purposes to consumers in this state. As Commissioner Conway, in his supporting Opinion acknowledged, this proceeding presented novel and unprecedented facts that were never contemplated by the

prior case law on this issue. (ICN 138, Commissioner Conway Supporting Opinion ¶8 (Sept. 6, 2023).) Despite these novel facts, the Commission was nonetheless provided with a roadmap by the Court in *Wingo* about how to undertake the analysis. Instead, the Commission, focused more on what the landlords could do under past precedent than what NEP is doing today. The result is a 167-page Opinion and Order, including a Separate Opinion in support by Commissioner Conway, in which the Commission provided a decision fraught with contradictions, inconsistencies in logic and rationale, and muddied conclusions that blur the line between whether the Commission was evaluating the actions of NEP or the landlords with which NEP contracts.

In *Wingo*, the Court directed the Commission to:

> [D]etermine whether it has jurisdiction based upon the jurisdictional statute, not the modified Shroyer test. In doing so, the PUCO will need to apply R.C. 4905.03 and determine whether NEP is an "electric light company," "water-works company," or "sewage disposal system company" "in the business of supplying" any of the covered services. Of particular significance in this inquiry are the meanings of the terms "electric light company," "water-works company," and "sewage disposal system company," "in the business of" and "supplying," and the application of those terms to the facts of the case. The application of the relevant legal standards to the facts is one that is best left to the PUCO in the first instance. *Wingo* ¶26.

The Commission acknowledged this direction its Opinion and Order. (ICN 138, Opinion and Order ¶181 (Sept. 6, 2023).) However, instead of embarking on this analysis, the Commission immediately focuses on who is the "consumer" and makes the determination that "NEP **cannot** be an electric light company because the landlord of each of the Apartment Complexes and not the tenant, is the "consumer", as contemplated under R.C. 4905.03(C), of electricity supplied by AEP Ohio. (*Id*. ¶184.) (Emphasis added.) This decision to ignore the guidance of the Court is inexplicable especially considering the Court (1) did not highlight the definition of "consumer" as being "of particular significance" in the inquiry in its guidance in *Wingo*; and (2) certainly if

the identify of the "consumer" was the dispositive issue the Court would have highlighted that in its decision.

Commissioner Conway correctly addresses the manner in which the analysis should have been conducted in his Separate Opinion. Commissioner Conway recites the language of R.C. 4905.03(C) while breaking it down into its individual elements. (ICN 138, Commissioner Conway Supporting Opinion ¶5 (Sept. 6, 2023).) He quotes R.C. 4905.03(C) which states an entity is:

> [A]n electric light company, when [1] engaged in the business [2] of supplying electricity for light, heat, or power purposes [3] to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state * * * . (*Id*.)

However, after providing this breakdown of the statute he then immediately states that the question in his view is at what point does the landlord's submetering activities (whether conducted in-house or by entities such as NEP) rise to the level of being engaged in the business of supplying electricity to tenants. (*Id*. ¶6.) This is the tact taken by the majority of the Commission when it focused on whether the conduct NEP engages is lawful if NEP were the landlord. (ICN 138, Opinion and Order ¶207 (Sept. 6, 2023).) But in *Wingo* the Court was clear the Commission must apply the statutory language to NEP not to the landlord. Commissioner Conway's initial question is misplaced as is the rationale the Commission relied on that if the landlord is authorized than NEP is authorized as the landlord's agent.

A. NEP is engaged in the business of supplying electricity as contemplated by R.C. 4905.03(C).

The record supports a finding that NEP is engaged in the business of supplying electricity. This Court held that "submetering involves buying gas electric, and other services from a public utility and the reselling those services to the ultimate consumer." *Wingo* ¶1. The

Court noted that originally submetering involved an apartment owner or owner of a multi-unit complex dividing up a master bill so each tenant could pay their share. *Id*. ¶3. But that today, submetering is a big business with companies such as NEP providing submetering services for multiple properties and landlords. *Id*. NEP serves approximately 1.75% of AEP Ohio's entire residential customer base. (ICN 139, Ohio Power Company Application for Rehearing pp. 63-64 (Oct. 6, 2023).)

AEP Ohio correctly and extensively applied R.C. 4905.03(C) to the activities NEP is "engaged in the business of" and the record does not support the Commission's conclusion. AEP Ohio detailed at length in its Initial Brief, Reply Brief, and Application for Rehearing the numerous undisputed facts demonstrating the actions NEP undertakes and why those actions constitute NEP engaging in the business of supplying electricity. (ICN 139, Ohio Power Company Application for Rehearing p. 62 (Oct. 6, 2023).) These actions include:

- Installing Equipment – NEP installs meters and all other necessary distribution equipment at the property using its own money (not the landlord's). (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.3); Tr. VI at 1047; see also NEP Ex. 90, at G-12 (CCSA § 1.7).)
- Maintenance and Repairs – NEP maintains and repairs meters and other distribution equipment using its own money (not the landlord's). (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.2.1).)
- Conversion – NEP is responsible for all aspects of working with AEP Ohio to convert AEP Ohio's individual-meter residential service to master-meter service. (NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.4); NEP Ex. 90, Ex. G, at G-7 (CCSA § 1.1.4); NEP Ex. 90, Ex. G, at G-33 (Meter Install. Agmt. Cover Sheet); AEP Ohio Ex. 3, Williams Direct, at 23.)

- Buying Master-Meter Service – NEP is required to pay all bills related to master-meter service, including AEP Ohio's bill and the CRES provider's bill. (NEP Ex. 63 90, Ex. G, at G-9 (CCSA § 1.3.5). NEP pays AEP Ohio bills for over 150 accounts totaling more than $8.5 million annually. (AEP Ohio Ex. 3, Williams Direct, at 7.) NEP has unfettered discretion over whether to use a CRES provider and which provider to choose. (NEP Ex. 90, Ex. G, at G-8 (CCSA § 1.3.2).)
- Reading Meters – NEP is responsible for reading meters on a regular basis. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.1).)
- Setting Rates – NEP does not follow the landlord's instructions regarding rates but rather builds its rate for individual usage into its form contract. (AEP Ohio Ex. 1, Lesser Direct, at 62-63.)
- Sending Bills – NEP bills tenants for electric service. NEP designs its bills, which prominently feature NEP's name and information. (NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.2).)
- Offering Payment Plans – NEP has unfettered discretion to determine what plans to offer. (NEP Ex. 90, Ex. G, at G-11 (CCSA § 1.4.6).)
- Customer Service – NEP maintains a customer service center to field customer calls about service, billing, and other topics related to the provision of electric service. (AEP Ohio Ex. 1 at 88-99.)
- Disconnection – NEP disconnects for nonpayment. (Tr. VI at 1096.)

These activities are clearly the *indicia* of an entity operating as a "public utility" as noted by AEP Ohio. These are all the same activities that an entity "engaged in the business of supplying electricity" would do. Of particular importance from OPAE's perspective is the

offering of payment plans and the disconnections for nonpayment. These are very clearly activities that electric light companies engage in, and which can have significant impact on low-income customers. They are also activities that landlords are either expressly prohibited from engaging in (disconnections) or are inconsistent with the traditional landlord business model (utility payment plans).

The Commission ignores these indicia and instead incorrectly focuses on the landlord's authority. The Commission states "foundational to all aspects of NEP's activities at the Apartment Complexes, the landlords have entered into express agency relationships with NEP through contracts that authorize NEP to 'step into the shoes of the landlords' in facilitating submetering service at the properties." (ICN 138, Opinion and Order ¶207 (Sept. 6, 2023).) The Commission then states "as the landlords' agent[s], NEP is 'engaged in the business of' providing a service to landlords that helps facilitate submetering service at the Apartment Complexes to the tenants and not to the general public." (*Id*.) Finally, the Commission notes that it does not find AEP Ohio's arguments regarding the types of activities NEP is engaged in to be persuasive because "AEP Ohio does not argue the landlord would be violating the law and AEP Ohio's tariff if it engaged in any of the above activities." (*Id*. ¶211.)

The Commission's reliance on the agency theory in which it grounded its reasoning is misplaced because it ignores clear guidance from the Court in *Wingo* and is at odds with black letter law. First and foremost, no party disputed that the landlords have the authority to resell utility services to their tenants. There is a litany of precedent from this Court establishing that well-settled principle. The question before the Commission was whether R.C. 4905.03(C) as applied to NEP resulted in NEP's activities amounting to operating as an electric light company, not whether R.C. 4905.03(C) as applied to a landlord and then contracted out to a third-party

amounted to the third-party acting as an electric light company. By first applying the text of R.C. 4905.03(C) to the landlord the Commission ignored the Court's express guidance in *Wingo* to apply it to NEP. The Court in *Wingo* placed no emphasis or instruction on first determining if the landlord could engage in reselling activities because it is clear landlords can. If the question was as simple as if the landlord can do it so can any entity with which they contract the Court likely would have made that clear and not remanded *Wingo*.

Ohio Revised Code 5321.15 expressly prohibits landlords from shutting off utility services for non-payment of rent. The record reflects NEP does in fact shut off tenants for non-payment. (Tr. VI at 1096.) NEP's disconnection flies in the face of the Commission's logic that NEP is merely acting as the landlord's agent because the landlord cannot disconnect utilities for non-payment. The Commission does not even attempt to address this logical inconsistency which undercuts their decision. Instead, the Commission callously states that landlord-tenant issues are not within the purview of the Commission's expertise and even assuming it is a violation of the law "affected tenants have remedies under landlord/tenant law." (ICN 138, Opinion and Order ¶219 (Sept. 6, 2023).) What a comfort to Ohioans struggling to make ends meet who have their utilities illegally disconnected by a submetering entity on behalf of their landlord – they have remedies under landlord/tenant law - but only if they have the resources to pursue them. Instead of reconciling and reworking its conclusion to comport with current law the Commission essentially ignores the law based on lack of expertise and punts the conclusion that its decision may be contrary to the law to the fact that other remedies exist.

The record supports a finding that NEP is in the business of selling electricity. The record reflects that NEP purchases electricity for each property it serves and has total control over whether it purchases its supply from a traditional provider such as AEP Ohio or a certified retail

electric service provider. (NEP Ex. 90, Ex. G, at G-8 (CCSA § 1.3.2).) The record reflects that NEP offers its services to landlords across the AEP Ohio territory. (ICN 139, Ohio Power Company Application for Rehearing pp. 63-64 (Oct. 6, 2023).) As discussed above, there are numerous other activities which constitute the indicia of providing electric service which NEP regularly engages in. The Commission's dismissal of these activities as merely an agent of the landlord assuming the landlord's authorized activities ignores and invalidates this Court's guidance from *Wingo* as well as the plain language of R.C. 4905.03(C) and is therefore improper.

B. Both landlords and tenants are the consumers to whom NEP supplies electricity for light heat and power purposes.

The record supports a finding that NEP is engaged in the business of supplying electricity. The next step in determining if NEP is an electric light company as defined by R. C. 4905.03(C) is to determine if NEP is supplying that electricity for light, heat, or power purposes to consumers within Ohio. It is undisputed that the Apartment Complexes in this proceeding are located in Ohio therefore the geographic requirement of R.C. 4905.03(C) is satisfied.

The Commission determined that NEP cannot be an electric light company because the landlord of each of the Apartment Complex and not the tenant is the "consumer" as contemplated under R.C. 4905.03(C). (ICN 138, Opinion and Order ¶184 (Sept. 6, 2023).) This conclusion is unsupportable as discussed above, because if the resolution to whether a submetering entity is operating as an electric light company truly hinged on whether the tenant or the landlord is the consumer, it is likely this Court would have determined that in *Wingo,* but it did not. Further, even Commissioner Conway's separate Opinion in Support recognizes that both the tenant and the landlord can be the "consumers" as contemplated by R.C. 4905.03(C). (ICN 138, Commissioner Conway Supporting Opinion ¶6 (Sept. 6, 2023).)

This is the same concept argued by AEP Ohio in the proceeding below. AEP Ohio aptly described it as the *Day One/Day Two* scenario. AEP Ohio explained:

> Indeed, there is no question that the tenant is a "consumer" under R.C. 4905.03(C) on *Day One*, before submetering, when AEP Ohio serves the tenant directly. On *Day Two*, when the building converts to submetering, nothing changes about the way the tenant *uses electricity*, and the only reasonable interpretation of the statute is that the tenant remains a "consumer."

OPAE agrees. The Commission's attempts to parse out the difference between the landlord as the consumer and the tenant as the consumer are based on cases which never addressed whether both the landlord and the tenant could be "consumers" for purposes of R.C. 4905.03(C). All of the cases cited by the Commission to support its contention that the landlord and only the landlord was the consumer dealt with factual scenarios that involved the landlord operating as the submetering entity which is not the case in this proceeding.

In this proceeding, the landlord has contracted with NEP to provide submetering service. The record reflects that NEP purchases electricity for each property it serves and has total control over whether it purchases its supply from a traditional provider such as AEP Ohio or a certified retail electric service provider. (NEP Ex. 90, Ex. G, at G-8 (CCSA § 1.3.2).) NEP provides electricity which is used by tenants to provide light and power to their residences as well as by the landlords to provide light and power to common areas. (ICN 139, Ohio Power Company Application for Rehearing pp. 59-60 (Oct. 6, 2023).) (Citing to NEP Ex. 90, Ex. G, at G-9 (CCSA § 60 1.4.1); AEP Ohio Ex. 1, Lesser Direct, at 59, 61; Tr. V at 983.) Additionally, NEP meters and bills each tenant for their usage because the tenant is a consumer of the service NEP provides. (See NEP Ex. 90, Ex. G, at G-24 to G-26 (CCSA Ex. D); NEP Ex. 90, Ex. G, at G-9 (CCSA § 1.4.2).) Applying the facts to R.C. 4905.03(C) it is clear both the tenants and the

landlords are consumers of electricity for light and power purposes as contemplated by the statute.

The case law the Commission uses in an attempt to undermine this fact is distinguishable because none of prior cases involved a third-party submeter like NEP. NEP's business model represents a factual scenario not contemplated by prior cases and therefore has exposed a gap in the existing case law as noted by this Court in *Wingo*. *Wingo* ¶25. There is no reasonable interpretation of R.C. 4905.03(C) which would eliminate the tenants of a submetered complex from the definition of "consumers" as used in that statute. The statute uses the plural "consumers" - therefore the statute clearly contemplates more than one consumer receiving service. Both the landlord and the tenants use the electricity supplied by NEP for lighting and power purposes and therefore both are consumers of NEP's service.

The record supports a finding that NEP is engaged in the business of supplying electricity for light, heat, or power purposes to consumers within Ohio consistent with the definition of an "electric light company" in R.C. 4905.03(C). OPAE respectfully requests that the Court either reverse and remand the Commission's decision with instructions to the Commission to find that NEP is an electric light company or reverse the Commission's decision and make the determination NEP is an electric light company (and therefore a public utility) based on the record before the Court.

II. Proposition of Law II (AEP Ohio's Proposition of Law II): The "Electric Reseller Tariff" Ordered by the Commission is Unreasonable and Unlawful Under the Commission's Own Interpretation of "Electric Light Company" Under R.C. 4905.03(C).

The Commission held that NEP was not an electric light company as defined by R.C. 4905.03(C) and the Commission therefore does not have jurisdiction to regulate NEP and its activities. (ICN 138, Opinion and Order ¶179 (Sept. 6, 2023).) Despite this determination, the

Commission nonetheless attempted to improperly delegate responsibility ability and authority to regulate NEP to AEP Ohio. (*Id*. ¶224.) The Commission made this attempt because it recognized that its decision that NEP was not an electric light company resulted in considerable harm to the tenants served by NEP. (*Id*.) These harms include the loss of Commission oversight, the loss of the right to shop (which is at odds with the Commission's earlier statement that by agreeing to a submetered lease tenants are exercising their right to shop), the loss of participation in the percentage of income payment program ("PIPP"), the loss of guaranteed payment plan offerings, and the loss of protections related to disconnection of service. (*Id*. ¶223.) These losses are particularly acute for low-income customers who rely on the PIPP program or other payment plans and who can be forced out of their homes if their landlord decides to switch to submetering and then the tenant can no longer afford to live in their home.

In an attempt to remedy this, the Commission ordered AEP Ohio to file a new electric reseller tariff that places requirements on any landlord who wishes to submeter. (*Id*.) These requirements include (1) notices in the lease, (2) an agreement that the landlord will not charge more than a similarly situated SSO customer, and (3) the imposition of the same disconnection requirements utilities must follow upon any landlord who wishes to disconnect a tenant's utility service. (*Id*. ¶224.) These conditions directly contradict the Commission's earlier acknowledgments that the Commission's jurisdiction does not extend beyond the public utility customer relationship. (*Id*. ¶190.) Further, even if the Commission had the authority to implement these conditions in this manner, which it does not, the Commission is delegating its authority to AEP Ohio and requiring AEP Ohio to suddenly monitor thousands of private contracts between tenants and landlords with no ability to meaningfully enforce these newly created terms.

OPAE agrees with AEP Ohio that the Commission lacks the authority to implement these changes outside of the Commission's traditional rules review process. No party to this proceeding presented evidence in support of the Commission's new electric reseller tariff. Therefore, there is nothing in the record on which the Commission could rely to create these alleged protections. This is a violation of R.C. 4903.09 because the Commission must explain its decision and base it on the record before it. Additionally, because these changes did not go through the traditional rules review process, interested parties were denied the opportunity to be heard as required by R.C. Chapter 119. Finally, as it stands, these changes would only apply to submetered tenants in AEP Ohio's service territory which amounts to discriminatory treatment for submetered tenants in other electric distribution utility territories within the state.

Any one of these issues on its own would be sufficient for the Court to reverse and remand the Commission's decision. Taken together they demand a reversal by the Court. Protecting customers from disconnections and predatory pricing is a laudable goal. However, the Commission could and should have achieved that goal through finding that NEP is an electric light company and therefore a public utility subject to Commission oversight. Instead, the Commission simultaneously disclaims jurisdiction over NEP but then attempts to exercise jurisdiction via tariff provisions. This approach is not supported by the record, or the statutes governing the Commission and must be reversed and remanded. If the Commission wishes to implement changes related to submetering via the imposition of tariff conditions, it should be required to follow the statutory process to do so including all steps required by R. C. Chapter 119 related to any changes to the disconnection rules.

CONCLUSION

For the foregoing reasons, OPAE respectfully requests that the Court either reverse and remand the Commission's decision with instructions to the Commission to find that NEP is an electric light company or reverse the Commission's decision and make the determination NEP is an electric light company (and therefore a public utility) based on the record before the Court. Further, the Court should remand this decision for further development of the record in support of any consumer protections the Commission wishes to implement via Tariff or Rule.

Respectfully submitted,

Robert Dove (0092019)
Kegler Brown Hill & Ritter Co. LPA
65 East State Street, Suite 1800
Columbus, OH, 43215
614-462-5443
rdove@keglerbrown.com

Counsel for Amicus,
Ohio Partners for Affordable Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was served via email on this the 22nd day of April 2024 upon the following:

Steven T. Nourse (0046705)
Counsel of Record
Michael J. Schuler (0082390)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
Tel (Nourse): 614-716-1608
Tel (Schuler): 614-716-2928
stnourse@aep.com
mjschuler@aep.com

Matthew S. McKenzie (0091875)
M.S. McKenzie Ltd.
P.O. Box 12075 Columbus, Ohio 43212
Telephone: (614) 592-6425
matthew@msmckenzieltd.com

L. Bradfield Hughes (0070997)
Eric B. Gallon (0071465)
Porter, Wright, Morris & Arthur, LLP
41 S. High Street, Ste. 3000
Columbus, Ohio 43215
Tel: (614) 227-2053 (Hughes)
Tel: (614) 227-2190 (Gallon)
bhughes@porterwright.com
egallon@porterwright.com

Counsel for Appellant,
Ohio Power Company

David Yost (0056290)
Attorney General of Ohio

John Jones (0051913)
Section Chief, Public Utilities
Assistant Attorney General
Public Utilities Section
30 E. Broad Street, 16th Floor
Columbus, OH 43215
Tel: 614-466-4397
Fax: 614-466-8764
John.jones@ohioago.gov

Counsel for Appellee,
Public Utilities Commission of Ohio

Michael J. Settineri (0073369)
Counsel of Record
Andrew P. Guran (0090649)
Anna Sanyal (0089269)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
mjsettineri@vorys.com
apguran@vorys.com
aasanyal@vorys.com

Drew B. Romig (0088519)
Nationwide Energy Partners, LLC
Associate General Counsel
230 West Street, Suite 150
Columbus, OH 43215
Tel: 330-418-6606
dromig@nationwideenergypartners.com

Counsel for Intervening Appellee,
Nationwide Energy Partners, LLC

/s/ Robert Dove
Robert Dove