BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Abandon Electric Service Lines, Pursuant to Ohio Revised Code Sections 4905.20 and 4905.21	))))	Case No. 23-118-EL-ABN

REPLY COMMENTS OF OHIO POWER COMPANY

Pursuant to the November 3, 2023 Entry in this proceeding, Ohio Power Company ("AEP Ohio") submits the following Reply Comments on the abandonment application.

I. INTRODUCTION

It is telling how little NEP's Initial Comments addressed the Miller Act standard – that is, whether the abandonment would be "reasonable" considering the "welfare of the public." *See* R.C. 4905.21. In fact, in numerous NEP filings in multiple cases, NEP has never articulated any way in which submetering is beneficial for customers, which in this case are the 405 residential customers who would be converted from public utility service to submetering. When NEP talks about benefits from submetering, it only ever cites benefits *to the landlord*, which here is Coastal Ridge Real Estate ("Coastal"). (*See* NEP Comments at 19 ("Under the contract, Coastal will receive meaningful economic benefits and infrastructure upgrades that will enhance the competitiveness of Sugar Run in the residential market.").

While the proposed conversion of the Sugar Run will likely bring lucrative "economic benefits" to Coastal and NEP (NEP Comments at 19), the conversion is unreasonable and contrary to the "welfare of the public" because of its effect on Sugar Run's residents. As AEP Ohio explained in its Initial Comments, the Sugar Run customers will lose a myriad rights and benefits that the Ohio General Assembly has deemed necessary to protect electric service

customers. Citing the Commission's decision in the recent submetering complaint case, *Ohio Power Co. v. Nationwide Energy Partners, LLC*, Case No. 21-990-EL-CSS ("Complaint Case"), NEP argues that "[t]o the extent that the Commission can address the 'harms' AEP Ohio speculates about in its Application, it already has." (NEP Comments at 22.) There were, however, numerous harms caused to submetered customers that the Commission's decision in the Complaint Case did not (and could not) remedy. Moreover, the Commission declined AEP Ohio's request in that case to address the conversions under the Miller Act – so the Complaint Case decision cannot possibly be cited as precedent to address the issues presented in the case at bar. As a related matter, NEP suggests that the resale tariff updates ordered in the Complaint Case decision should adequately protect residents. (*Id*.) But that tariff has not yet been filed, let alone approved, and is not effective; so at a bare minimum, the Commission should defer a decision in this case until after the tariffs are effective.

One of the significant public harms is the loss of the Percentage of Income Payment Plan ("PIPP"), which 5 customers in Sugar Run – who are served by AEP Ohio today and can participate in low-income assistance program – currently rely on to afford their electric bills and maintain access to one of life's necessities. That is not all. As AEP Ohio explained in its Initial Comments, the Sugar Run residents – who are served by AEP Ohio and currently possess a right to shop – will also lose the right to shop for electric service (268 customers currently shop), and whether those residents will be protected from unreasonable disconnection practices after the Complaint Case is, at best, highly uncertain. Conversion to submetering plainly will not further the "welfare of the public" under the Miller Act. Whatever rights Landlords have to establish master meter service when initially developing property, there is no corollary right to switch back-and-forth or convert a property after the utility has built out to serve the initial

configuration; a proper examination under the Miller Act (including a hearing) cannot lawfully be ignored or bypassed in a proposed master metering conversion such as Sugar Run.

Rather than seriously address the Miller Act standard, NEP instead raises numerous legal claims, arguing that landlords have a "right" to submeter tenants and that the outcome of this case is controlled by the Commission's decision in the Complaint Case. All these arguments, however, are red herrings in a Miller Act inquiry. As explained more fully below, and in AEP Ohio's Memorandum Contra NEP's Motion to Dismiss, the Ohio Supreme Court has made clear that under the Miller Act, timing matters. If the Sugar Run complex were a new building, and AEP Ohio had never served the tenants, the Miller Act would not apply, and all of NEP's arguments about a landlord's current "right" to submeter the building would be applicable. But once AEP Ohio began serving the Sugar Run residences 22 years ago, they became *existing customers*, and the Miller Act protections attached. Under the Miller Act, AEP Ohio cannot be forced to abandon any existing customer load unless the Commission holds that the abandonment is "reasonable." And the Ohio Supreme Court has clearly stated that those Miller Act protections of existing customers apply *even if they will be served by another entity after abandonment*. This renders all of NEP's arguments about landlord's rights irrelevant to the Miller Act inquiry here.

II. REPLY COMMENTS

A. NEP's Complaints About AEP Ohio's "Service Plan" Are Red Herrings Because AEP Ohio Has No Obligation to Sell Its Equipment and the Miller Act Applies to All Abandonments of All "Load Centers," Regardless of Size.

NEP takes issue with AEP Ohio's "service plan," arguing that if AEP Ohio sold its existing equipment to NEP, there would be no abandonment because AEP Ohio "need not alter its use of a single inch of wire or conduit, or any equipment other than meters." (NEP

Comments at 13-15.) That argument fails on multiple grounds as discussed below. Consequently, it should be rejected.

First, AEP Ohio has no obligation to sell its equipment to NEP or Coastal. NEP cites no authority or source for such a legal obligation. NEP sought such a requirement in AEP Ohio's most recent base case, but the stipulation that was approved by the Commission only required AEP Ohio to respond to a request to purchase equipment within a specified time. *See* Case No. 20-585-EL-AIR, March 12, 2021 Joint Stipulation and Recommendation ¶ III.E.12 ("The Company agrees to make best efforts to respond within 21 days to customer requests to purchase AEP Ohio facilities on customer premises."). There is not, and never has been, any requirement for AEP Ohio to sell its own equipment, and there would be no basis for creating such a requirement here.[1] Moreover, under the approved tariff, it is the Company's responsibility, subject to the electric code and in keeping with sound engineering practices, to design a service plan for extension of facilities. (*See* Ohio Power Company Terms and Conditions of Service (PUCO No. 21) at ¶¶ 8-10.) NEP's subjective complaints about the service plan do not alter the Miller Act analysis that controls this case.

Second, the Ohio Supreme Court has addressed precisely the kind of forced takeover of electric service that NEP is envisioning, and the Court clearly held that the Miller Act applies and requires the Commission to consider whether the forced takeover is "reasonable" and furthers the "welfare of the public." In *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St. 3d 508 (1996), the City of Clyde ordered public utility Toledo Edison to abandon its service within the City to enable the municipal utility to take over electric service to that same load. The Supreme Court

[1] Forcing AEP Ohio to sell equipment in this proceeding would be profoundly improper and would raise a host of statutory and constitutional issues. AEP Ohio assumes that the Commission would not take such an extraordinary step in this Miller Act case, but AEP Ohio reserves all rights to raise legal challenges if the Commission were to do so.

held that the Miller Act applied to this forced takeover of electric service from Toledo Edison, and it held that the Miller Act required approval from the Commission before Toledo Edison could be forced to end its service to its existing customers. *Clyde*, 76 Ohio St. 3d at 516.

Third, NEP's arguments about the amount or extent of abandoned equipment are legally irrelevant under the Miller Act. *Clyde* specifically addressed whether the Miller Act had any "size" threshold, and after reviewing the history of the Miller Act, the Court held that the Miller Act applies to *any* abandonment of service, even abandonment of "individual-customer-service lines." *Clyde*, 76 Ohio St. 3d at 515. The Court reasoned:

> [W]e find that the General Assembly's intent to protect consumers is best promoted by interpreting the Miller Act to apply to the abandonment or withdrawal of services from any electric line, *including individual-customer-service lines* like the ones at bar. This interpretation maximizes consumer protection and reduces the opportunities for abuse by requiring commission oversight and review over the abandonment of *any electric line, regardless of size*.

Id. (emphasis added). Here, there is no question that AEP Ohio maintains service to hundreds of residential customers at Sugar Run. The proposed conversion is a forced "withdrawal of services" from those lines, and that is true whether AEP Ohio abandons the lines in place, repurposes them elsewhere (as AEP Ohio would do with any removed meters, at a minimum), or sells them to NEP or Coastal. Thus, the Miller Act applies here, and the scope of the abandoned equipment is irrelevant. Rather, the key point in considering the "welfare of the public," R.C. 4905.21, is that 405 residential customers at Sugar Run will lose key statutory protections, including PIPP and the right to shop, if the conversion is approved.

B. The Landlord's "Right" to Submeter a Building Is Irrelevant Under the Miller Act Because Sugar Run Is Not New Load, and the Miller Act Protects the "Nexus" Between AEP Ohio and Its Existing "Load Centers."

NEP puts forward numerous legal arguments about submetering. NEP argues that landlords have a "well-established legal right" to submeter their properties and that "[a]dhering

to the law is *per se* reasonable." (NEP Comments at 15-16.) Similarly, NEP argues that Coastal has a "choice" to submeter Sugar Run under AEP Ohio's Tariff. (NEP Comments at 16-17.) NEP argues that the "landlord-tenant" relationship is outside the Commission's jurisdiction. (NEP Comments at 17-19.)

All these legal arguments are completely out of step with the Ohio Supreme Court's explanation of the Miller Act. In *Clyde*, the Ohio Supreme Court made clear that under the Miller Act, timing matters. A key fact in *Clyde* was that the customers in question were *existing* customers that Toledo Edison had begun serving in the past and was currently serving at the time of the case. As *Clyde* explained, this was a crucial distinction because the Miller Act and its predecessor statute were "specifically enacted and have been used to protect *existing* utility facilities, utility consumers, and their utility providers." *Clyde*, 76 Ohio St. 3d at 514 (emphasis added); *see also id.* at 513 (explaining that "the Miller Act focuses on protecting *existing utility customers*" (emphasis added). *Clyde* also explained that the Miller Act does *not* protect a utility's right to serve *new* load. *Clyde* summarized the Miller Act as follows:

> Simply stated, the Miller Act protects the nexus between the utility provider and its existing facilities or load centers, binding them together in such a manner that only the commission can compel termination of that relationship. New facilities or load centers have no nexus to the public utility . . . .

Id. at 516; *see also id.* at 515 ("The [Miller] Act protects only *existing* facilities and the service rendered thereby." (emphasis added)).

Here, therefore, NEP's arguments about Coastal's right to submeter the Sugar Run complex might be applicable if the Sugar Run residences were *new load* that AEP Ohio had never served. In that new load scenario, the Miller Act would not apply. Here, however, when AEP Ohio began serving the Sugar Run residences 22 years ago, this created a "nexus between the utility provider and its existing facilities or load centers, binding them together in such a

manner that only the commission can compel termination of that relationship." *Clyde*, 76 Ohio St. 3d at 516.

Likewise, NEP's argument that the master meter tariff establishes a landlord right to convert an individually-metered property is misguided and does not displace the Miller Act public interest inquiry. A landlord's right to service under the tariff is not absolute but it qualified by the law and by other parts of the tariff, including the resale tariff (with the additional terms and conditions update that is currently pending), fulfillment of other general terms and conditions of service in the Company's tariff and the Miller Act. So whatever rights Landlords have to establish master meter service when initially developing property, there is no corollary right to endlessly switch back-and-forth or convert a property after the utility has built out to serve the initial configuration. In short, a proper examination under the Miller Act (including a hearing) cannot lawfully be ignored or bypassed in a conversion situation such as Sugar Run.

Unlike the Northtowne abandonment proceeding (Case No. 22-693-EL-ABN) where NEP argued that the tenant harms "are illusory" in part because of the updates ordered to the resale tariff by the Complaint Case decision (NEP 22-693 Comments at 19-20), NEP omits such arguments in its current comments. Similarly, in the Northtowne proceeding, NEP's comments included "Exhibit NEP-1" which referenced language "to be inserted" into the tenant leases. Even assuming the veracity and accuracy of counsel statements in 22-693 not supported by affidavit or evidence (which AEP Ohio contests), there is no statement or evidence in this case that harms have been addressed either by lease provisions or an updated tariff scheme (which has not yet been filed). In deciding this case, the Commission cannot presume that either of these events are complete with respect to Sugar Run – yet the consumer harms undoubtedly exist.

Equally unavailing is NEP's argument that the Commission should not address the "reasonableness" of the proposed conversion to submetering because the "landlord-tenant" relationship is outside the Commission's jurisdiction. (NEP Comments at 16-18.) Regardless of the scope of the Commission's jurisdiction over the landlord-tenant relationship (the Commission clearly has *some* jurisdiction there, as shown by the restrictions on landlords in the new tariff ordered in the Complaint Case), this Miller Act inquiry is not about the landlord-tenant relationship. The Commission currently has jurisdiction over the "nexus" between AEP Ohio and the "load centers" that are the Sugar Run residences, and the question here under the Miller Act is whether the Commission should "compel" a "termination of that relationship." *Clyde*, 76 Ohio St. 3d at 516. Thus, if the Commission approves the conversion to submetering, its jurisdiction will be significantly reduced. Now, however, the Commission maintains full jurisdiction over AEP Ohio's service to the Sugar Run residences, and the Commission is authorized by the Miller Act to require that this service be maintained if a forced withdraw of service is "unreasonable" (which it is).

C. The Fact That Residents Would Continue to Receive Electric Service "Through Their Landlord" Is Irrelevant, Because the Miller Act Applies to Any Takeover of Electric Service from One Provider to Another.

NEP claims that the forced conversion to submetering is reasonable because the "tenants will continue to receive electric service supplied by AEP Ohio through their landlord." (NEP Comments at 20.) To support that argument, NEP cites two gas abandonment cases. (*See* NEP Comments at 20 nn.13-14.) NEP has again put forward an argument that fails on multiple grounds.

First, the fact that the Sugar Run residents will continue to receive electric service "through their landlord" is irrelevant, as *Clyde* demonstrates. As discussed above, *Clyde* makes clear that the fact that service is continued in another form does not exempt the abandonment

from Miller Act review. Indeed, in *Clyde*, the residential customers in question were not at risk of losing electric service because they would continue to receive electric service from the municipal utility if Toledo Edison were forced to abandon its service to them. That was, in fact, the entire point of the forced abandonment in *Clyde* – the City wanted to force out Toledo Edison so its municipal utility could take over. The *Clyde* "takeover" scenario is precisely the same as what Coastal (and NEP) are attempting here. Here, therefore, the Commission is required to determine whether the proposed conversion to submetering is "reasonable" and furthers the "welfare of the public" even though the residents will continue to receive electric service "through their landlord." And in making that determination, the Commission should hold that the conversion is *not* reasonable, since service "through the landlord" will lack many of the statutory rights and benefits that come with service from AEP Ohio, as AEP Ohio explained in its Initial Comments.

Second, the cases cited by NEP are inapposite for the simple reason that the abandonments were uncontested. Indeed, in both cases, in stark contrast to the situation here, the utility *requested and supported* the abandonment. *In re Application of Northeast Ohio Natural Gas Corp. for Authority to Abandon Service*, Case No. 22-789-GA-ABN, Finding and Order (May 18, 2016) ("*Northeast* Finding and Order"); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Abandon Natural Gas Service*, Case No. 15-1272-GA-ABN, Finding and Order (May 18, 2016) ("*Columbia* Finding and Order"). Moreover, no parties raised the concerns (very much present here) about customers losing their statutory rights and benefits of public utility service. *See Northeast* Finding and Order ¶ 8 (noting that Dominion had already taken over service); *Columbia* Finding and Order ¶ 4-5 (single customer line was abandoned where customer did not object and service was "not economically feasible). Finding of public

interest is a completely different matter under the undisputed facts here: current AEP Ohio customers would be stripped of statutory rights if the conversion is approved.

D. "Interference With Contract" Is Not a Relevant Miller Act Consideration.

Taking another tack, NEP claims that the Commission must find the conversion to submetering reasonable because to do otherwise would "interfere" with the contract between NEP and Coastal (NEP Comments at 19). That argument, as with NEP's other arguments, is simply inapposite. There is no authority suggesting that the Miller Act considers private contracts in the "reasonableness" analysis. Nor does applying Ohio law (the Miller Act) somehow "interfere" with private contracts.

For similar reasons, NEP's argument that the tenants have "agreed" to the conversion in boilerplate lease language is meritless. As an initial matter, it is impossible to believe that the Sugar Run PIPP participants knew that they were giving up their ability to participate in that vital public benefit by signing an adhesion contract containing legalese about submetering. The Commission should decline to give effect to that part of the lease as void against public policy. Ultimately, these are contested matters that should be resolved through an evidentiary hearing, as required by the Miller Act. In any event, even if the residents had agreed, the Miller Act protects the utility (here, AEP Ohio) as well as the customer. The Miller Act expressly states that it applies not just where a utility wishes to abandon service, but also where the utility is being "required to abandon or withdraw" service against its will. Moreover, as *Clyde* explains, once a utility begins serving customers, the Miller Act creates a "nexus between the utility provider and its existing facilities or load centers, binding them together in such a manner that only the commission can compel termination of that relationship." *Clyde*, 76 Ohio St. 3d at 516. This is why, under *Clyde*, the "name" on the customers account does not matter. *Id.* at 515 ("[The utility's] existing electric lines do not become unprotected by the Miller Act merely because the

name on the bill changes."). The Miller Act applies to "existing facilities" and "load centers," and protects the utility from any forced withdraw from those facilities or load centers without Commission approval. Therefore, this tenant consent argument – as with NEP's other arguments – is merely a red herring that distracts from the Commission's true inquiry here into the reasonableness of the forced conversion.

E. When Considering the Public Welfare, it Would be Unreasonable to Grant the Abandonment.

As set forth in AEP Ohio's Initial Comments, if abandoned, 5 Sugar Run customers will immediately lose access to the vital protections of PIPP. These are customers that are at or below 175% of the federal poverty level (that is required to qualify for PIPP) that will no longer receive the dual benefits of monthly bills based upon a percentage of their income and monthly forgiveness of past arrearages. The Sugar Run residents will also lose their right to shop for competitive retail electric service, resulting in termination of 268 active contracts if the Commission grants abandonment. Granting abandonment would also place the Sugar Run residents into the murky waters of the current disconnection regulations applicable to submetered customers – an issue that is steeped in legal and practical concerns. Finally, it is not in the public welfare to forcefully remove the regulated utility that has safely and reliably served these customers for over half a century; especially, under the aforementioned conditions.

These poignant concerns went unaddressed by NEP/Sugar Run and should be duly considered by the Commission, leading to the inexorable conclusion that abandonment should not be granted.

F. The Commission should ignore NEP's additional extra-record (contested) and hearsay statements that attempt to support the benefits of "master metering" to the rental market.

Finally, NEP submits over six pages of business and policy arguments support of master metering's importance to the rental market. (NEP Comments at 20-26.) Some of the statements are hearsay from third parties and some is just unsupported narrative or "testimony" in the form of comments without being supported by empirical or objection evidence. In addition to being contested extra-record material, the arguments miss the mark and address landlord business interests while ignoring the tenant/consumer harms and the Miller Act determinations that need to be made without regard to insular business interests. Further, landlord or real estate industry benefits ignore the separate and distinct conduct of a large-scale third-party submetering company that is different from the property owner or landlord rights and activities. Moreover, the arguments in this section presume that the resale tariff updates are in place (which is not the case) and that the provisions are effective in addressing consumer harms (which AEP Ohio disputes). In sum, the matters asserted by NEP in this section are disputed and contested by AEP Ohio.

NEP itself admits that the issues presented are undetermined and require substantial additional analysis (to overcome the consumer harms already acknowledged in the Complaint Case):

> If it is possible at all, analyzing whether a particular conversion to master-metered service is "reasonable" would require at least a thorough understanding of the residential leasing market, the business model of the landlord, the features of the community and condition of its infrastructure, housing regulations and assistance programs like HEAP, the trends in preferences of tenants, and how these and countless other variables may change in the future.

(NEP Comments at 24.) In other words, evidence and a hearing is required before making a determination of whether an abandonment is "reasonable" under the Miller Act. Given that this is a contested proceeding, the Commission should set the matter for hearing.

III. CONCLUSION

For the foregoing reasons, for the reasons articulated in AEP Ohio's Initial Comments, and for the reasons AEP Ohio expects to develop further in the evidentiary record at hearing,[2] the Commission should deny the proposed abandonment of the customers at Sugar Run.

Respectfully submitted,

/s/ Steven T. Nourse

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

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

Counsel for Ohio Power Company

[2] As AEP Ohio explained in its Initial Comments (at 11), the Miller Act requires the Commission to hold an evidentiary hearing before ruling on the proposed abandonment in this proceeding. *See* R.C. 4905.21.

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 23rd day of January 2024, via electronic transmission.

/s/ Steven T. Nourse
Steven T. Nourse

E-Mail Service List:

dromig@nationwideenergypartners.com;
john.jones@ohioago.gov
steven.beeler@ohioago.gov

Summary: Comments Reply Comments electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company.