**Before**

**The Public Utilities Commission of Ohio**

Mark A. Whitt, )

 )

 Complainant, )

 ) Case No. 15-697-EL-CSS

v. )

 )

Nationwide Energy Partners, LLC, )

 )

 Respondent, )

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# Motion to Intervene and Memorandum in Support

# of Industrial Energy Users-Ohio

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**June 23, 2015 Attorneys for Industrial Energy Users-Ohio**

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# Motion to Intervene of

# Industrial Energy Users-Ohio

Industrial Energy Users-Ohio (“IEU-Ohio”) hereby respectfully moves the Public Utilities Commission of Ohio (“Commission”), pursuant to R.C. 4903.221 and Rule 4901-1-11, Ohio Administrative Code, for leave to intervene in the above-captioned matter with the full powers and rights granted by the Commission, specifically by statute or by the provisions of the Ohio Administrative Code, to intervening parties to address the contested legal issues raised by the Complaint.

As demonstrated further in the Memorandum in Support attached hereto and incorporated herein, IEU-Ohio has a direct, real, and substantial interest in the issues and matters involved in the above-captioned proceeding, and is so situated that the disposition of this proceeding may, as a practical matter, impair or impede its ability to protect that interest. IEU-Ohio believes that its participation will not unduly prolong or delay this proceeding and that it will significantly contribute to the full development and equitable resolution of the factual and other issues in the proceeding. The interests of IEU-Ohio will not be adequately represented by other parties to the proceeding and, as such, IEU-Ohio is entitled to intervene with the full powers and rights granted by the Commission, specifically by statute and by the provisions of the Ohio Administrative Code, to intervening parties.

 Respectfully submitted,

 */s/ Frank P. Darr*

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 **Attorneys for Industrial Energy Users-Ohio**

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# Memorandum in Support

# introduction

The Complaint filed by Mr. Whitt alleges that Nationwide Energy Partners is billing Mr. Whitt in violation of regulatory requirements applicable to public utilities. The Complaint thus raises a fundamental question regarding the scope of the Commission’s authority to regulate and supervise the contested business relationship between the parties. As framed by Mr. Whitt, however, the Complaint has broader implications. Not all arrangements that allow an ultimate consumer of electricity, natural gas, water, or wastewater treatment services to obtain such service from or through another consumer or separate entity have a purpose, nature, or scope that is sufficient to cause the arrangement to fall within the common law or statutory definition of a “public utility.” Similar observations apply to determinations regarding the applicability of requirements to competitive retail electric service (“CRES”) providers.

It is often the case in Ohio that multiple non-residential consumers are located on property, such as a campus, which includes facilities, plant, and equipment that allows each consumer to receive electricity, natural gas, water or wastewater treatment services through a “master-meter,” or jointly or individually owned facilities, plant, or equipment. These arrangements arise voluntarily and have become more common over time because corporations have spun off or separated individual business units that may have separate corporate identities even if commonly owned. Typically, these arrangements are ancillary to and not the primary purpose of the relationship between the individual non-residential consumers.

Because this proceeding invites the Commission to draw the line between the scope and nature of activities that give rise to “public utility” or CRES provider status and those activities that do not, IEU-Ohio[[1]](#footnote-1) has an interest in the outcome of this proceeding. Its interest is to assure that voluntary[[2]](#footnote-2) and ancillary arrangements such as those discussed above are not impaired by the Commission’s decision. Accordingly, IEU-Ohio should be granted intervention as a party for the purpose requested herein.

# The Complaint, the Answer, and pending motions to intervene

In his complaint, Mr. Whitt (“Complainant”) alleges that Nationwide Energy Partners, LLC (“Respondent”) supplies or arranges for the supply of electricity service, water, and sewer service that is provided to Complainant’s condominium. Complaint at ¶¶ 1, 2, 7, & 8 (Apr. 10, 2015) (“Complaint”). He further alleges that the Respondent is a public utility because it performs these services. *Id*. at ¶ 2. Complainant asserts that he is being charged amounts that are greater than those available to shopping customers in AEP-Ohio’s service territory and that the rates on which his bills are based have not been disclosed or approved by the Commission. *Id*. at ¶¶ 11-14. Further, Complainant alleges that Respondent does not possess necessary certificates of public convenience to provide utility services, a certified territory, or a certificate to serve as a CRES provider. *Id*. at ¶¶ 15-19. Based on these allegations, Complainant alleges in Count I that Respondent is unlawfully engaging in the supply or arrangement of noncompetitive retail electric service. *Id*. at ¶ 29. In Count II, he further alleges that Respondent is unlawfully performing the functions of a CRES provider. *Id*. at ¶ 34. In Count III, Complainant alleges that Respondent is operating in the certified territory of AEP-Ohio in violation of R.C. 4933.83. *Id*. at ¶ 39. In Counts IV and V, Complainant alleges that Respondent is engaging in the unlawful provision of water service and sewage disposal service. *Id*. at ¶¶ 44 & 49. As relief for these alleged violations, Complainant seeks findings that the Respondent knowingly and unlawfully engaged in the business of a public utility, that the Respondent knowingly and unlawfully engaged in the business of supplying CRES, and that the Respondent’s charges are unjust, unreasonable, unfair, discriminatory, and in violation of law. Further, Complainant seeks refunds, damages, the opportunity to seek treble damages, and a determination that the Respondent is subject to penalties and forfeitures. *Id*. at pages 8-9.

Respondent denies that it is a public utility or provides CRES. Answer at ¶¶ 2-3 (Apr. 30, 2015) (“Answer”). Additionally, Respondent denies many of the material allegations of the Complaint concerning its relationship with the Complainant. *Id*. at ¶¶ 6-8. Respondent, however, “admits that pursuant to its contract with the [Complainant’s condominium association] it issues bills to the Complainant on a monthly basis.” *Id*. at ¶ 9. Respondent further admits that none of the charges is disclosed in monthly bills, that it is not authorized or certified to provide utility services, that its charges have not been approved or reviewed by the Commission, and that it is not certified as a supplier of CRES or that it knowingly provides utility services. *Id*. at ¶¶ 12-18 & 22. It then denies the material allegations of the Complaint’s Counts alleging that Respondent is acting illegally. *Id*. at ¶¶ 23-49. Respondent also raises defenses that challenge the jurisdiction of the Commission and asserts that the Respondent is an agent for third parties providing utility service. *Id*. at ¶¶ 50-56.

Both the Office of the Ohio Consumers’ Counsel (“OCC”) and Ohio Partners for Affordable Energy (“OPAE”) filed motions to intervene. OCC sought intervention on behalf of residential customers and stated that issues presented in this case include whether the Respondent is operating unlawfully as a public utility. Motion to Intervene by the Office of the Ohio Consumers’ Counsel, Memorandum in Support at 1 (May 6, 2015). OPAE sought intervention on behalf of low and moderate-income residential customers and its agency members and noted that the scope of the Commission’s jurisdiction to regulate public utilities is at issue. Motion to Intervene by Ohio Partners for Affordable Energy, Memorandum in Support at 1-2 (May 19, 2015).

The Ohio Power Company (“AEP-Ohio”) also has sought to intervene on the basis that it has rights under the Certified Territory Act (R.C. 4933.81, *et seq*.) that may be impaired and asserted that the Commission should not decide this issue without hearing the legal position of AEP-Ohio. Motion to Intervene of Ohio Power Company at 3 (June 2, 2015). According to AEP-Ohio, the issues in this case “implicate AEP Ohio’s interests as the utility that would have provided retail electric service in the absence of [the Respondent’s] allegedly unlawful actions.” *Id*. at 4. AEP-Ohio concludes that the Complaint also “has the potential to affect AEP Ohio’s interest in business operations throughout its service territory because it raises substantial questions regarding the statutory definition of ‘public utility,’ R.C. 4905.02 and ‘electric light company,’ R.C. 4905.03(C).” *Id*. at 4-5.

# The Commission Should Grant IEU-Ohio’s Motion to Intervene

## Considerations Governing a Grant of a Motion to Intervene

The right to intervene is governed by statute and Commission rule. R.C. 4903.221(A) provides that any person that may be adversely affected by a decision of the Commission may move to intervene. If a person moves to intervene, the Commission shall consider the following criteria:

(1) The nature and extent of the prospective intervenor's interest;

(2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;

(3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;

(4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

Rule 4901-1-11(B), Ohio Administrative Code, further provides that intervention shall be granted if a person has a real and substantial interest in the proceeding and is so situated that disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest unless the person’s interest is adequately protected by another party. Intervention is to be liberally granted to assure that the positions of all persons with a real and substantial interest in the case will be considered by the Commission. *Ohio Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 111 Ohio St.3d 384, ¶ 16 (2006).

## IEU-Ohio Has a Real and Substantial Interest in the Outcome of the Proceeding

IEU-Ohio is an association of ultimate customers and a Commission-certified CRES provider. A current listing of IEU-Ohio members is available on IEU-Ohio's website at http://www.ieu-ohio.org/member\_list.aspx. IEU-Ohio’s members purchase substantial amounts of electric and other utility services including services provided by AEP-Ohio.

IEU-Ohio’s members work together to address matters that affect the availability and price of utility services. Additionally, IEU-Ohio seeks to promote customer-driven policies that will assure an adequate, reliable, and efficient supply of energy for all consumers at competitive prices.

The members of IEU-Ohio have an interest in minimizing the delivered costs of goods and services. Voluntary arrangements for electric, water, or other services that are incidental to primary businesses among companies that are commonly owned or are located on a common property or contiguous properties are a recognized means of reducing costs through economies of scale and scope. Under well-understood Ohio statutes and judicial and administrative orders, these arrangements are not subject to the Commission’s regulatory supervision.

### “Traditional” public utility

A “public utility” is defined in R.C. 4905.02 as “every corporation, company, copartnership, person, or association, their lessees, trustees, or receivers, defined in Section 4905.03 of the Revised Code, including all public utilities that operate their utilities not for profit,” but excludes “[e]lectric light companies that operate their utilities not for profit” and “a public utility … that is owned and operated exclusively by and solely for the utility’s customers.” R.C. 4905.03 provides the functional or operating characteristics for various types of public utilities such as a water-works company, sewage disposal company, or an electric light company.[[3]](#footnote-3) In all cases relevant here, the functional definition also specifies that public utility status is confined to persons engaged in the business of performing the function with regard to consumers in Ohio. *In the Matter of the Application of The Procter & Gamble Company for Relief From Compliance With the Obligations Imposed by Title 49 of the Ohio Revised Code*, Case No. 03-725-HC-ARJ, Entry at 2 (Apr. 10, 2003). Thus, the statutory definitions of a public utility subject to the Commission’s regulation and supervision look beyond the function being performed and consider the purpose and scope of the activity.

The General Assembly has further provided that a person providing “competitive retail electric services,”[[4]](#footnote-4) an “electric service company,” is deemed to be an electric light company. R.C. 4928.01(A)(9). An “electric supplier” also is defined as an electric light company, but the Certified Territory Act limits the application of the Act to “electric service,” which does not include the furnishing of competitive retail electric service. R.C. 4933.81(A) & (F).

“The statutory definitions, however, are not self-applying.” *Pledger v. Pub. Util. Comm’n of Ohio*, 109 Ohio St.3d 463, 465 (2006) (“*Pledger*”). For example, the Commission applies a three-part test[[5]](#footnote-5) (that the Ohio Supreme Court (“Court”) has affirmed in *Pledger*) to determine if a landlord providing certain services to a tenant fell within the definition of a public utility subject to the Commission’s regulation and supervision. The three-part test requires a determination of the following:

1. Does the landlord intend to be a public utility by availing himself of the special benefits available to public utilities such as accepting a public franchise grant, the use of a public right of way, or the right to use eminent domain in the construction or operation of its service?

2. Does the landlord only provide the utility service to his tenants rather than the general public?

3. Is the provision of the utility service clearly ancillary to the landlord’s primary business?

*Inscho, et al. v. Shroyer's Mobile Homes*, PUCO Case No. 90-182-WS-CSS
(February 27, 1992) (“*Shroyer*”); *Brooks, et al. v. Toledo Edison Co.*,1996 Ohio PUC Lexis 292 (May 8, 1996) (“*Brooks*”).

In *Brooks*, tenants in a landlord-tenant dispute complained that the landlord’s resale of electric service to the tenants was unlawful and caused the landlord to operate as an unregulated public utility. The tenants also sued Toledo Edison because it failed to enforce its tariff that contained a restriction on resale of electric service. The Commission dismissed the complaint, holding that the utility company had no valid right or interest in restricting redistribution and resale by a landlord if the landlord was not acting as a public utility and the landlord owned the property on which the redistribution took place. *Brooks* at \* 32. Further, the Commission characterized any redistribution restriction in the Toledo Edison’s tariff as void because the company had no valid right or interest in attempting to prohibit or economically regulate resale or redistribution. *Brooks* at \*41.[[6]](#footnote-6)

The Commission’s three-part test in landlord-tenant cases follows from the Court’s admonition that the determination whether a person is a “public utility” is a mixed question of law and fact. *A & B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64 Ohio St.3d 385, 387 (1992). “The main and frequently most important attribute of a public utility is a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service.” *Id*. *See, also, Southern Ohio Power Co. v. Public Util. Comm. of Ohio*, 110 Ohio St. 246, 252 (1924). This factor requires that the business, in order to qualify as a public utility, must "provide its good or service to the public indiscriminately and reasonably." *A & B Refuse Disposers, Inc*., 62 Ohio St.3d at 387. “The second characteristic of a public utility most often addressed by courts is whether the entity, public or private, conducts its operations in such a manner as to be a matter of public concern.” *Id*. at 388. The Court, however, noted that no one factor is controlling and several factors must be weighed to determine whether the company’s business is conducted in such a manner as to become a matter of public concern. *Id*. at 387.

### Competitive retail electric services

In Amended Substitute Senate Bill 3 (“SB 3”), the General Assembly declared that retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within a certified territory of an electric utility are competitive retail electric services that consumers may obtain from any supplier. R.C. 4928.03. A company supplying or arranging competitive services is an “electric services company,” commonly referred to as a CRES provider.

The enactment of SB 3 did not alter the Commission’s determinations regarding the nature and scope of functional activities that give rise to public utility status. Following its decision in *Brooks*, the Commission stated, “[N]othing in SB3 … requires or warrants the Commission to change its position that such landlords are not electric light companies.” *In the Matter of the Application of First-Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues,* PUCO Case Nos. 99-1212-EL-ETP, *et al*., Entry at 3 (January 18, 2001) (“*FirstEnergy*”).[[7]](#footnote-7) Additionally, the Commission concluded that a landlord was not an “aggregator” because that designation was inconsistent with prior holdings and would lead to unnecessary regulation and possibly costly reconfiguration of electric facilities. *Id*.

### Electric supplier

Under the Certified Territory Act, an “electric supplier” may not “furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier.” R.C. 4933.83(A). An “electric supplier” is defined as “any electric light company as defined in section 4905.03 of the Revised Code, including electric light companies organized as nonprofit corporations.” R.C. 4922.81(A). The scope of the Act is specifically limited to the provision of noncompetitive electric services. R.C. 4933.83(F).[[8]](#footnote-8)

### The issues presented in this case may impact or impair an interest of members of IEU-Ohio

The Complaint alleges that the Respondent is operating unlawfully as a public utility, CRES provider, and electric supplier. The Respondent contests those claims. Thus, this proceeding invites the Commission to consider the scope and nature of activities that give rise to “public utility” or CRES provider status. The decision whether the Respondent is acting in such a way as to trigger Commission supervision, however, may affect the interests of IEU-Ohio’s members. As noted above, multiple non-residential consumers located on property, such as a campus, may enter into voluntary arrangements that allow each consumer to receive electricity, natural gas, water or wastewater treatment services through various arrangements. These arrangements are ancillary to and not the primary purpose of the relationship between the individual non-residential consumers. *In the Matter of the Application of The Procter & Gamble Company for Relief From Compliance With the Obligations Imposed by Title 49 of the Ohio Revised Code*, Case No. 03-725-HC-ARJ, Entry at 2 (Apr. 10, 2003). IEU-Ohio has an interest in the outcome of this proceeding to assure that these common and useful arrangements are not impaired by the resolution of this case.

## IEU-Ohio’s Interests Are Not Represented by Other Parties

## Complainant, Respondent, and the other parties seeking intervention do not share the same interests as IEU-Ohio and its members in the outcome of this proceeding. None is a Commission-certified CRES provider, and none is or represents energy-intensive industrial or commercial customers. Accordingly, IEU-Ohio’s interests are not represented by another party.

## IEU-Ohio’s Participation Will Assist in the Full Development and Equitable Resolution of the Issues and Will Not Unduly Prolong or Delay the Proceeding

The interest of IEU-Ohio’s members is focused on assuring that arrangements that are ancillary or incidental to the primary businesses of commercial and industrial customers are not impaired by the Commission’s decision in this case. IEU-Ohio is seeking to intervene at an early point in this matter. Because IEU-Ohio’s interest is focused and it seeks intervention at this early time, IEU-Ohio’s intervention will assist in the full development of the issues and will not unduly prolong this proceeding.

# Conclusion

For the reasons discussed above, IEU-Ohio requests that the Commission grant its Motion to Intervene.

 Respectfully submitted,

 */s/ Frank P. Darr*

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**Certificate of Service**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission’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 *Motion to Intervene and Memorandum in Support of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 23d day of June 2015, *via* electronic transmission.

*/s/ Frank P. Darr*

 Frank P. Darr

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1. IEU-Ohio is a Commission-certified CRES provider. Certificate Number 00-001E(8), issued in Case No. 00-1711-EL-AGG (Oct. 27, 2014). [↑](#footnote-ref-1)
2. Agreements or deed restrictions that contain provisions compelling a consumer to buy energy from a particular supplier may be unlawful irrespective of how particular arrangements might be viewed for purposes of determining if the arrangements subject a supplier of goods or services to public utility status. *Orwell Natural Gas Co., Inc. v Fredon Corp.*, 2015-Ohio-1212 (11th Dist. Ct. App. Mar. 31, 2015). [↑](#footnote-ref-2)
3. R.C. 4905.03 provides:

As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

…

(C)  An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

…

(G)  A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

…

(M)  A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state. [↑](#footnote-ref-3)
4. R.C.4928.01(A)(4). [↑](#footnote-ref-4)
5. The test originally contained a fourth element addressing the reasonableness of the landlord’s charges. The Commission has reduced their adopted test to a three-part test, eliminating the fourth element. *See Brooks, et al. v. Toledo Edison Co.*, 1996 Ohio PUC Lexis 292 at \*23 (May 8, 1996). [↑](#footnote-ref-5)
6. Subsequently, the General Assembly enacted R.C. 4928.40(D). That division provides: “Beginning on the starting date of competitive retail electric service, no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service.” Statutory exceptions also may prevent the Commission from exercising regulatory authority over the distribution of services. Under a statutory exception, the Commission concluded that a non-profit cooperative arrangement for the joint operation of a sewage treatment facility by industrial customers was not subject to the Commission’s regulatory jurisdiction. *In the Matter of the Application of Hissong-Kenworth, Inc. Requesting a Declaration Regarding its Public Utility Status*, Case No. 84-565-ST-ARJ, Entry at 1 (May 22, 1984).) Also, R.C. 4905.03(E) provides that “upon application, the commission may relieve any producer or natural gas, which producer is defined in that section as a gas or natural gas company, of compliance with obligations imposed by Chapters 4901, 4903, 4905, 4907, 4909, and 4923, Revised Code, so long as such producer is not affiliated with or under the control of a gas company or natural gas company engaged in the transportation or distribution of natural gas, or so long as such producer does not engage in the distribution of natural gas to customers.” *See, e.g., In the Matter of the Application of American Landfill Gas Company*, Case No. 97-194-GA-ARJ at 2 (Apr. 18, 1997) [↑](#footnote-ref-6)
7. *See, also, Orwell Natural Gas Co. v. Fredon Corp*., 2015-Ohio-1212 ¶¶ 60-72 (11th Dist. Ct. App. Mar. 11, 2015) (deed restriction limiting right to procure natural gas violates public policy). [↑](#footnote-ref-7)
8. See, also, *U.S. Steel Corp. v. Northern Indiana Pub. Service Co.*, 482 N.E.2d 501 (In. 1985), in which the Indiana Court of Appeals held that an industrial customer that distributed electricity to itself across assigned service areas, that distributed electricity to itself across state lines, that resold electricity to other industrial customers located within its own larger industrial complex, and that resold electricity to adjacent industrial customers was not a public utility subject to the Indiana Service Area Assignments Act. Additionally, some customers in an Ohio certified territory may secure electric service from more than one supplier of electricity. The “home rule” authority of Ohio municipalities can be exercised in ways that allow multiple electric suppliers to extend service to load centers within the municipality irrespective of the certified service areas. *In the Matter of the Complaint of Ohio Power Company*, Case No.06-890-EL-CSS, (July 25, 2007). [↑](#footnote-ref-8)