**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

Ohio Power Company )

) Case No. 21-990-EL-CSS

Complainant, )

)

v. )

)

Nationwide Energy Partners, LLC )

)

Respondent. )

**APPLICATION FOR REHEARING OF THE PUCO’S ENTRY DENYING OCC’S INTERVENTION**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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August 26, 2022 (willing to accept service by e-mail)

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This case involves the future of electric service for over one thousand residential consumers served by AEP who may be forced to become customers of a submeterer (reseller), Nationwide Energy Partners (“NEP”). The Ohio Supreme Court has described NEP as a “big business,” “third-party reseller[]” that provides “submetering services for multiple properties and landlords” for profit.[[1]](#footnote-2)

But the PUCO (affirming the decision of Attorney Examiner Sandor) has wrongly denied consumers the intervention of their state representative, the Ohio Consumers’ Counsel (“OCC”).[[2]](#footnote-3) Denying consumers their voice in this matter violates Ohio law, the Ohio Administrative Code, and Ohio Supreme Court precedent. The PUCO should grant rehearing and reverse its July 27 Entry denying OCC intervention.

Over one thousand residential consumers of AEP may be “adversely affected”[[3]](#footnote-4) by the outcome of this complaint case. NEP wants to resell or redistribute (submeter) electric utility service to AEP consumers living in five Ohio apartment complexes. If NEP prevails, these consumers will lose AEP as their distribution utility, along with many of the consumer protections they receive from their current, utility-regulated supplier AEP. The PUCO’s July 27 Entry unreasonably and unlawfully denies these consumers a voice through their statutory advocate, OCC.

R.C. 4903.10 permits the filing of an application for rehearing for the PUCO to “abrogate or modify” an order. O.A.C. 4901-1-35 also allows for applications for rehearing. The PUCO’s July 27 Entry affirming the Attorney Examiner’s denial of intervention to OCC is unreasonable and unlawful in the following respects:

**ASSIGNMENT OF ERROR NO. 1:** The PUCO erred by unlawfully denying OCC’s intervention in violation of R.C. 4903.221, O.A.C. 4901-1-11, and Ohio Supreme Court precedent.

**ASSIGNMENT OF ERROR NO. 2:** The PUCO erred by unjustly and unreasonably affirming the Attorney Examiner’s decision to deny OCC intervention because the PUCO incorrectly determined that OCC’s only interest in AEP’s complaint against NEP is in its precedential value.

The reasons for supporting this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its July 27, 2022 Entry as requested by OCC.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

# INTRODUCTION

The PUCO’s July 27, 2022 Entry (“July 27 Entry”) affirming the Attorney Examiner’s decision to deny OCC intervention in this case effectively silences over one thousand AEP consumers living in five Ohio apartment complexes on issues affecting their essential PUCO-regulated electricity service. While AEP and NEP argue over who can distribute electric utility service to the apartment complexes, the residential consumers living there face real and substantial harm. Important consumer protections may be gone if consumers lose their AEP service. ***That harm to consumers is imminent*** – if not already occurring – because the PUCO has required AEP to process NEP’s construction requests so NEP can submeter service to the apartment complex residents pending the resolution of this matter.[[4]](#footnote-5)

The PUCO’s Entry denying consumers representation through their state advocate, OCC, is unlawful and unreasonable. If anything, the PUCO should be *welcoming* consumer advocacy with regard to submetering issues.

To protect residential consumers living in the five apartment complexes at issue in AEP’s Complaint, OCC moved to intervene on October 28, 2021. The Attorney Examiner denied OCC’s intervention on January 31, 2022. OCC sought an immediate interlocutory appeal to the PUCO of the Attorney Examiner’s decision on February 7, 2022. The PUCO denied OCC’s appeal in the July 27 Entry.[[5]](#footnote-6)

For the reasons explained below, the PUCO should abrogate or modify its July 27, 2022 Entry and grant OCC’s intervention in this case.

# ASSIGNMENTS OF ERROR

## ASSIGNMENT OF ERROR NO. 1: The PUCO erred by unlawfully denying OCC’s intervention in violation of R.C. 4903.221, O.A.C. 4901-1-11, and Ohio Supreme Court precedent.

The PUCO states that the central issue in this case is whether NEP operates as a public utility when it submeters service to consumers living in the five apartment complexes.[[6]](#footnote-7) But according to the PUCO’s Entry, “OCC does not have a real and direct interest related to the central merits of this case.”[[7]](#footnote-8) The PUCO is wrong.

R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding.[[8]](#footnote-9) R.C. 4903.221(B) requires the PUCO to consider the following criteria in ruling on motions to intervene:

(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; and

(4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.[[9]](#footnote-10)

To intervene, a party should also have a “real and substantial interest” according to O.A.C. 4901-1-11(A)(2) and meet the criteria of O.A.C. 4901-1-11(B)(1)-(4), which mirror the statutory criteria in R.C. 4903.221(B).

OCC moved to intervene to represent the interests of over one thousand AEP residential consumers living in five apartment complexes where NEP wants to submeter service. These residential consumers may be adversely affected by this case, and they may already be harmed, given the PUCO’s determination that AEP must process NEP’s construction requests pending the outcome of this matter.[[10]](#footnote-11) Thus, OCC has a “real and substantial interest.” In its motion to intervene, OCC explained how it satisfies the requirements of R.C. 4903.221 and O.A.C 4901-1-11.

But the PUCO has denied consumers the intervention of their state representative, the OCC. That is unlawful. Residential consumers deserve to have a voice that is heard by the PUCO, as the legislature decided. The PUCO’s decision contradicts the Ohio Supreme Court holding that “intervention ought to be ***liberally allowed*** so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”[[11]](#footnote-12) In *Ohio Consumers’ Counsel v. PUC*, the Ohio Supreme Court held that the PUCO abused its discretion in denying intervention to OCC and reversed the PUCO. The Court relied on the reasons stated in OCC’s memoranda supporting intervention to conclude that intervention should have been granted.[[12]](#footnote-13)

The PUCO’s July 27 Entry denying OCC’s intervention contradicts the Ohio Supreme Court’s decision. It leads to an unlawful and unfair regulatory structure wherein consumers’ voices are silenced, flouting the Court’s direction that “intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”[[13]](#footnote-14) The Ohio Supreme Court also ruled in another case involving NEP that consumers deserve more protection from submeterers.[[14]](#footnote-15) Consumers should get the benefit of the Ohio Supreme Court’s decisions. And OCC should be allowed to lawfully advocate for consumers in this case.

OCC explained in its motion to intervene (as well as in its Reply to NEP’s opposition to OCC’s intervention[[15]](#footnote-16)) that if the over one thousand residential consumers are forced to take submetered service through NEP, each faces the prospect of being harmed by, among other things: potential higher charges and fees for electric utility service and losing rate transparency;[[16]](#footnote-17) inability to choose competitive retail suppliers;[[17]](#footnote-18) no access to budget and percentage of income payment program (“PIPP”) plans to help

pay bills;[[18]](#footnote-19) and losing other important consumer protections regarding disconnections and service quality in the PUCO’s rules and Ohio law.[[19]](#footnote-20)

OCC made clear in its motion to intervene that it sought to represent the interests of the over one thousand residential consumers affected by this case. OCC stated succinctly, per R.C. 4903.221, that “the nature and extent of OCC’s interest is representing the residential customers of AEP Ohio in this case who may lose consumer protections if NEP is allowed to serve them through submetering.”[[20]](#footnote-21) OCC explained again, per R. C. 4903.221, that our consumer advocacy would include that the affected residential consumers “should not lose service protections they currently receive in the event NEP is permitted to provide submetering.”[[21]](#footnote-22) Continuing to focus on the over one thousand residential consumers affected by this case, OCC emphasized the “very real and substantial interest in this case where NEP, a submetering service company, wants to provide essential electric utility service to AEP Ohio’s residential consumers.”[[22]](#footnote-23)

OCC’s Reply supporting intervention remained focused on the over one thousand residential consumers affected by this case and our right under state law to advocate for those consumers. “Over a thousand residential consumers of AEP Ohio may be ‘adversely affected’ by NEP’s demands to resell (submeter) electric utility service in apartment complexes. If NEP prevails, the apartment complex residents will pay higher rates and lose many of the consumer protections they receive when AEP Ohio provides service under PUCO regulation.”[[23]](#footnote-24) OCC pointed out the real harms that the over one thousand residential consumers affected by this case will face if they are forced to receive their essential electric utility service from NEP.[[24]](#footnote-25) “Therefore, over a thousand of AEP Ohio’s residential consumers have real and substantial interests firmly grounded in the complaint.”[[25]](#footnote-26)

The PUCO states that OCC’s intervention is “premature” because any interest OCC has would be moot if the PUCO determines that NEP does not operate as a public utility.[[26]](#footnote-27) However, a PUCO determination that NEP does not operate as a public utility when it submeters service is *precisely why* OCC has a real and substantial interest in this case. If the PUCO determines that NEP can continue to submeter without providing the protections consumers receive from the regulated public utility (AEP), consumers *will be harmed*. Contrary to the PUCO’s claims, OCC does have a real and substantial interest in this case as required by O.A.C. 4901-1-11. Thus, the PUCO should grant rehearing and grant OCC’s intervention so that it can protect the affected consumers’ interests.

## ASSIGNMENT OF ERROR NO. 2: The PUCO erred by unjustly and unreasonably affirming the Attorney Examiner’s decision to deny OCC intervention because the PUCO incorrectly determined that OCC’s only interest in AEP’s complaint against NEP is in its precedential value.

The PUCO denied OCC intervention to protect consumers because it unreasonably and incorrectly determined that OCC’s only interest in this case is in its precedential value.[[27]](#footnote-28) Rather than its precedential value, OCC in its motion to intervene and Reply explained clearly that its interest in this case under state law is its effects on the over one thousand residential consumers that may be forced to receive their essential electric service from NEP. As stated above, these consumers may already face harm given the PUCO’s decision to allow NEP to submeter pending the outcome of this case. These consumers have a right to be heard under Ohio law, including R.C. 4903.221. The PUCO has wrongly denied them a voice.

The PUCO relies on a 2015 decision from *In re Complaint of Mark Whitt*, Case No. 15-697-EL-CSS,[[28]](#footnote-29) to deny OCC’s intervention.[[29]](#footnote-30) But the PUCO’s reliance on *Whitt* is misplaced and that decision should not control here. The PUCO states that the denial of OCC’s intervention in *Whitt* is “identical” to the PUCO’s decision to deny OCC intervention here.[[30]](#footnote-31) It is not. Unlike the over one thousand AEP consumers that could be “adversely affected”[[31]](#footnote-32) by NEP in this case, *Whitt* concerned a **single** residential consumer complainant (Mark Whitt) against NEP.[[32]](#footnote-33) NEP acknowledged in that case that Mr. Whitt was (and still is) an attorney experienced in utility regulatory matters before the PUCO.[[33]](#footnote-34) Thus, Mr. Whitt was fully capable of representing his own interests in the matter. Because *Whitt* involved a dispute between a single residential customer and NEP, (both of whom were represented by experienced counsel) the PUCO denied intervention to OCC and others for not demonstrating how they represented the interests of either Mark Whitt or NEP.

By contrast, AEP’s complaint against NEP in this case could adversely affect over one thousand apartment complex residential utility consumers, who are likely inexperienced in litigating matters before the PUCO. These consumers’ interests will not and cannot be adequately represented by AEP or NEP. As set forth in AEP’s complaint, the apartment complex residents have real and substantial interests in this case, and they deserve representation by the statutory residential utility consumer advocate, OCC.

In addition, although OCC’s intervention in *Whitt* was denied (mistakenly in OCC’s view), the PUCO stated that its decision did not foreclose OCC and other parties from representing consumers’ interests through participation in the PUCO-ordered investigation into submetering in Case No. 15-1594-AU-COI. There, OCC and other parties had “an opportunity to contribute to the full development and equitable resolution of the underlying legal issue.”[[34]](#footnote-35) OCC did participate in the PUCO’s submetering investigation, which resulted in the PUCO’s adoption of the so-called “modified *Shroyer* test” to evaluate whether submetering companies like NEP operate as public utilities.[[35]](#footnote-36)

The modified *Shroyer* test was subsequently reversed by the Supreme Court of Ohio (“Court”) in *In re Wingo*, 2020-Ohio-5583.

Unlike *Whitt*,there is no opportunity through another proceeding for OCC to represent the interests of the over one thousand residential consumers who stand to lose their AEP electric utility service. Nor will OCC have “an opportunity to contribute to the full development and equitable resolution”[[36]](#footnote-37) of whether NEP acts as a public utility. The PUCO has not settled the jurisdictional issue since the modified *Shroyer* test was reversed by the Court. That is because on remand to the PUCO, the complainant in *Wingo* filed a notice of voluntary dismissal, which was granted by the PUCO.[[37]](#footnote-38) Thus, the question of whether NEP acts unlawfully as a public utility is not settled, and there is no other PUCO proceeding to resolve the issue where the interests of the apartment complex residents will be represented.

The PUCO criticizes OCC for not filing an interlocutory appeal of the decision to deny OCC’s intervention in *Whitt*.[[38]](#footnote-39) But, as stated, OCC had another opportunity to represent consumers’ interests at that time in Case No. 15-1594-AU-COI. There is no such opportunity now. Further, what OCC did or did not do procedurally in *Whitt* does not somehow estop OCC from seeking intervention in this case to advocate for over one thousand residential consumers who face losing their AEP service. The PUCO’s suggestion to the contrary is wrong. Whether OCC filed an interlocutory appeal in *Whitt* is wholly irrelevant to the PUCO’s own failure to follow the law with respect to OCC’s intervention in this case.

The other cases the PUCO cites[[39]](#footnote-40) to support its erroneous decision also should not control here. The PUCO cites *In re Ohio Schools Council, et al. v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS, but OCC did not even move to intervene in that case. In *Ohio Schools Council*, the PUCO denied motions to intervene by sophisticated industrial consumers who argued they could be affected by FirstEnergy Solutions’ rates.[[40]](#footnote-41) Unlike the residential consumers that OCC seeks to protect in this case, the industrial consumers in *Ohio Schools Council* were not faced with losing their PUCO-regulated electric distribution utility service and many of the consumer protections that go with it. In this case, residential consumers who face record inflation and surging energy costs face losing their ability to participate in the PIPP program and other AEP budget billing programs. They may lose important protections against disconnection. To equate the residential consumers living in the apartment complexes NEP wants to serve with the large business and industrial consumers that sought intervention in *Ohio Schools Council* is absurd.

The PUCO also relies on a 2001 decision from *In re Complaint of City of Cleveland*, Case No. 01-174-EL-CSS.[[41]](#footnote-42) But that case involved motions to intervene by the City of Parma, the City of Toledo, and Alleghany Energy Supply Company.[[42]](#footnote-43) Further, the PUCO *granted* Parma’s intervention and *granted* intervention on a limited basis to Toledo and Alleghany Energy Supply. Nothing in the PUCO decision in *City of*

*Cleveland* justifies denying residential consumers a voice in this case affecting their essential electric distribution utility service.

In sum, the cases relied on by the PUCO in denying intervention to OCC to protect consumers should not control OCC’s motion to intervene here. OCC should be granted intervention in this case to represent the interests of over one thousand residential consumers who will be adversely affected if they are forced take electric utility service from NEP. The PUCO should grant rehearing to modify the July 27 Entry and grant OCC intervention.

# CONCLUSION

Over a thousand residential consumers could be subject to unreasonable electric rates and inadequate electric service if NEP prevails in this case and provides submetering services to the apartment complexes at issue. OCC satisfies the standards in R.C. 4903.221 and O.A.C. 4901-1-11 for intervention in this case. Consumers deserve to be heard through OCC, the statutory representative of consumers. To protect consumers, the PUCO should grant rehearing and abrogate or modify the July 27 Entry and grant OCC’s motion to intervene.

Respectfully submitted,

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*/s/ Angela D. O’Brien*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing of the PUCO’s Entry Denying OCC’s Intervention was served on the persons stated below via electronic transmission, this 26th day of August 2022.

*/s/ Angela D. O’Brien*

Angela D. O’Brien

Assistant Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. *See Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208 (2020). [↑](#footnote-ref-2)
2. Case No. 21-990-EL-CSS, PUCO Entry (July 27, 2022) (“July 27 Entry”). [↑](#footnote-ref-3)
3. R.C. 4903.221. [↑](#footnote-ref-4)
4. July 27 Entry, at ¶ 48. [↑](#footnote-ref-5)
5. July 27 Entry, at ¶ 53. [↑](#footnote-ref-6)
6. July 27 Entry, at ¶ 54. [↑](#footnote-ref-7)
7. July 27 Entry, at ¶ 54. [↑](#footnote-ref-8)
8. *See also* Ohio Adm. Code 4901-1-11(A)(2) (to intervene, a party should have a “real and substantial interest”). [↑](#footnote-ref-9)
9. *See also* Ohio Adm. Code 4901-1-11(B)(1)-(4) (Administrative Code criteria that mirror the statutory criteria in R.C. 4903.221(B)). [↑](#footnote-ref-10)
10. July 27 Entry, at ¶ 48. [↑](#footnote-ref-11)
11. *Ohio Consumers Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 20 (emphasis added). [↑](#footnote-ref-12)
12. *Id.* at ¶¶ 18; 20. [↑](#footnote-ref-13)
13. *Id.* at ¶ 20. [↑](#footnote-ref-14)
14. *See Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208 (2020). [↑](#footnote-ref-15)
15. *See* OCC’s Reply to NEP’s Memorandum Contra OCC’s Motion to Intervene (November 12, 2021) (“Reply”). [↑](#footnote-ref-16)
16. AEP Complaint, at ¶¶ 61-64. [↑](#footnote-ref-17)
17. AEP Complaint, at ¶ 52. [↑](#footnote-ref-18)
18. AEP Complaint, at ¶¶ 53-54. [↑](#footnote-ref-19)
19. AEP Complaint, at ¶¶ 55-60. [↑](#footnote-ref-20)
20. *See, e.g.,* OCC’s Motion to Intervene (October 28, 2021) at 2. [↑](#footnote-ref-21)
21. *Id.* [↑](#footnote-ref-22)
22. *Id.* at 3. [↑](#footnote-ref-23)
23. *See, e.g.,* OCC’s Reply (November 19, 2021) at 1. [↑](#footnote-ref-24)
24. *See Id.* at 3. [↑](#footnote-ref-25)
25. *Id.* [↑](#footnote-ref-26)
26. July 27 Entry, at ¶ 54. [↑](#footnote-ref-27)
27. July 27 Entry, at ¶ 53. [↑](#footnote-ref-28)
28. Case No. 15-697-EL-CSS, PUCO Entry, (November 18, 2015) (“*Whitt*”). [↑](#footnote-ref-29)
29. July 27 Entry, at ¶ 53. [↑](#footnote-ref-30)
30. July 27 Entry, at ¶ 53. [↑](#footnote-ref-31)
31. R.C. 4903.221. [↑](#footnote-ref-32)
32. *See* Case No. 15-697-EL-CSS, Complaint of Mark Whitt (April 10, 2015). [↑](#footnote-ref-33)
33. Case No. 15-697-EL-CSS, NEP Memorandum Contra to OCC Motion to Intervene (May 21, 2015), at 2. [↑](#footnote-ref-34)
34. Case No. 15-697-EL-CSS, PUCO Entry, (November 18, 2015), at ¶ 9. [↑](#footnote-ref-35)
35. AEP Complaint, at ¶¶ 20, 24. [↑](#footnote-ref-36)
36. Case No. 15-697-EL-CSS, PUCO Entry, (November 18, 2015), at ¶ 9. [↑](#footnote-ref-37)
37. *See In re Complaint of Wingo*,Case No. 17-2002-EL-CSS, Entry (July 14, 2021). [↑](#footnote-ref-38)
38. July 27 Entry, at ¶ 53. [↑](#footnote-ref-39)
39. July 27 Entry, at ¶ 53. [↑](#footnote-ref-40)
40. *In re Ohio Schools Council, et al. v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry (September 4, 2014). [↑](#footnote-ref-41)
41. July 27 Entry, at ¶ 53. [↑](#footnote-ref-42)
42. Case No. 01-174-EL-CSS, Entry (March 29, 2001). [↑](#footnote-ref-43)