

even seriously refute AEP Ohio's and OCC's claims that submetering (and NEP's business practices in particular) cause substantial harm to customers. Instead, NEP proposes a blind adherence to prior precedent. But the Ohio Supreme Court has made clear that the Commission may revisit its prior precedents where justified by changed circumstances. *See, e.g., In re Application of Ohio Power Company*, 2015-Ohio-2056, ¶ 16. And here, the Commission precedent NEP cites never addressed the recent changed circumstances involving the proliferation of harmful submetering practices such as those engaged in by NEP. Where, as here, an entity intentionally has taken advantage of a gap in regulation to earn profit at the expense of customers, the Commission can and should revisit its prior precedent to fill the regulatory gap. The Commission can do that here by adopting AEP Ohio's proposed tariff amendment.

I. The Commission has the legal authority to grant AEP Ohio's tariff amendment.

NEP claims that AEP Ohio's proposed tariff amendment "contravenes controlling precedent." NEP Memo Contra at 2. IEU makes a similar claim. *See* IEU Memo Contra at 2-3. As AEP Ohio has acknowledged in this docket and in its comments in Case No. 15-1594-AU-COI,¹ when the Commission addressed submetering *before* the recent proliferation of the harmful submetering practices engaged in by NEP, American Power & Light ("AP&L"), and others, the Commission declined to impose limits on submetering. *See Brooks v. Toledo Edison Co.*, Case No. 94-1987, 1996 WL 331201 (May 8, 1996), *aff'd on reh'g* at 1996 WL 470528; *see also FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371 (2002). But that does not mean that the Commission cannot *revisit* those precedents in light of new circumstances. Submetering is an area where the Commission has broad authority to interpret relevant statutes and exercise its discretion to adopt and implement policies. *See, e.g., Pledger v. Pub. Utils. Comm'n of Ohio*,

¹ *See, e.g.,* AEP Ohio Memorandum in Support at 6-7; Case No. 15-1594-AU-COI, AEP Ohio & Duke Initial Cmts. 21-23; Case No. 15-1594-AU-COI, AEP Ohio & Duke Reply Cmts. 5-6.

2006-Ohio-2989 (noting that “[s]omething more than the words of the statute is needed” in the context of submetering). Where, as here, parties have shown that circumstances have changed and customers are suffering harm because of a gap in regulation permitted by prior Commission rulings, the Commission should revisit its prior precedent, fill the gap, and protect customers. *See, e.g., In re Application of Ohio Power Company*, 2015-Ohio-2056, ¶ 16 (explaining that the Commission may “revisit a particular decision” and “change course” so long as the Commission “explain[s] why” it is not following its earlier precedent); *see also id.* (the Commission need only provide “a few simple sentences” in order to “explain why the earlier case [is] no longer controlling” (citing *Consumers’ Counsel*, 16 Ohio St. 3d 21, 21-22 (1985))).

Critically, moreover, the Ohio Supreme Court has made clear that the Commission has full authority to regulate the “master meter” service provided by the public utility to the submetered premises. *See Shopping Centers Association v. Public Utilities Commission of Ohio*, 3 Ohio St. 2d 1 (1965). AEP Ohio’s proposed tariff amendment falls squarely within that authority because it regulates the terms and conditions under which AEP Ohio will provide service to a submetering landlord. That is, no matter whether submetered *tenants* are “consumers” under the statute, the Court has held that a submetering *landlord* (or other entity) is a “consumer,” and thus the Commission has full jurisdiction under Title 49 of the Revised Code to regulate the tariff terms and conditions under which a public utility such as AEP Ohio provides electric service to a submetered landlord (or other entity).

II. NEP has taken advantage of a gap in the Commission’s regulation to earn profit in a way that harms customers.

It is notable that NEP, of all parties, would attempt to rely on the Commission’s prior precedents, since NEP’s CEO has admitted that his company was created for the purpose of taking advantage of – and profiting from – the gap in regulation permitted by the Commission’s

prior precedents. He has stated candidly that NEP’s leaders were “very deliberate when [they] started the business 10 years ago to put it in a place where it was not regulated.” Case No. 15-1594-AU-COI, OCC Initial Cmts. Attach. 1, at 4. Accordingly, he has recognized that NEP is a “new utility” and its business is “very unique.” *Id.* Thus, NEP effectively has admitted that the Commission’s prior precedents did not address the NEP business model, and did not address the substantial harms that NEP’s business model causes customers. The Commission should revisit its precedents in light of NEP’s efforts to take advantage of a gap in the Commission’s regulation.

Moreover, it is striking that NEP has not attempted to make the case that its business practices are *beneficial* for customers, nor has it seriously rebutted the claims made by AEP Ohio, OCC, and other parties that NEP’s business practices harm customers. In its Memorandum Contra in this docket, for instance, NEP merely rests on the Commission’s prior practices and does not seriously deny the allegations in the complaint and AEP Ohio’s Motion for Tariff Amendment that NEP’s business practices harm customers. Where, as here, a party has effectively conceded (through its silence) that it has exploited a gap in regulation in a way that harms customers, there can be little doubt that the Commission should exercise its broad discretion to fill the regulatory gap and protect customers. The Commission can accomplish that goal by granting AEP Ohio’s motion to amend its tariff here.

III. This is an appropriate docket to address submetering.

NEP claims that AEP Ohio’s motion should be denied “[i]n light of the pendency of [the] investigation” in Case No. 15-1594-AU-COI. NEP Memo Contra at 5. Likewise, OAA and ICSC have moved to hold the case “in abeyance” pending resolution of the investigation docket.

As explained in AEP Ohio’s Memorandum in Support of its Motion for Tariff Amendment, AEP Ohio stands by its arguments and recommended outcome in Case No. 15-1594-AU-COI, but the Complaint filed by OCC in this docket raises an alternative method for the Commission to begin to address submetering. NEP argues that the Commission must first determine whether NEP and related entities are “public utilities” in the investigation docket before it can address AEP Ohio’s proposed tariff amendment. NEP Memo Contra at 5. But either docket provides a means for the Commission to address the harms caused by submetering, and the Commission could choose either path. It is well established that the Commission has the discretion to determine how to manage its docket most efficiently.²

Indeed, as explained above, even if the Commission adopts a revised definition of “public utility” in the investigation docket, the Commission will *still* regulate the “master meter” service between AEP Ohio and the submetering landlord (or other entity), and that is the topic of this docket. As a result, even though the two dockets provide a means to address the harm caused by submetering, the legal bases of the two dockets are distinct and independent, and the Commission can go forward with both dockets in parallel.

IV. There is no reason to limit the tariff change to residential customers.

OCC and IEU, for different reasons, recommend that AEP Ohio’s tariff amendment not address submetering on non-residential premises. *See* OCC Memo Contra at 3; IEU Memo Contra at 4-6. Although the most egregious submetering practices, including the business practices of NEP and AP&L, are centered on residential premises, there are no good grounds to adopt different rules for residential submetering and non-residential submetering. OCC, with its

² *See, e.g., In re Application of Duke Energy Ohio, Inc. for Approval of an Advanced Meter Opt-Out Service Tariff*, Case Nos. 14-1160-EL-UNC et seq., Entry at 2-3 (Sept. 16, 2015); *In re Application of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-35-10*, Case No. 15-386-EL-WVR, Entry at 4 (Apr. 22, 2015).

statutory purview limited to *residential* customers, *see generally* R.C. 4911.02, understandably focused its Complaint in this docket on submetering's effect on residential customers. But unless otherwise specified, the Terms and Conditions of AEP Ohio's tariffs (which AEP Ohio seeks to change in this Motion) apply equally to all customers, whether residential, commercial, or industrial. AEP Ohio's proposed tariff change should not be limited to residential customers.

In addition, IEU raises concerns about so-called "shared services arrangements," claiming that these arrangements "have been long recognized as beneficial to customers and lawful." IEU Memo Contra at 5. But IEU does not explain when, if ever, the Commission has recognized – let alone "long recognized" – that these arrangements are "beneficial to customers." IEU provides no grounds to create any special rules for "shared services arrangements," which seem to be just submetering by another name.

V. The Commission should retain jurisdiction to address the transition away from submetering.

As AEP Ohio explained in its Memorandum in Support, *see* Memo in Supp. at 5 n.1, there are several issues that may arise if the Commission takes action to limit submetering and encourage existing submetered premises to convert to a situation in which AEP Ohio provides individual meter service to tenants or occupants. For example, for AEP Ohio to provide service to tenants or occupants who are currently submetered, AEP Ohio may need to install new infrastructure or take over infrastructure that was installed by landlords or submetering companies. OCC echoes these concerns, noting that it is "essential to assure continuity of service for residential customers . . . , including a transition period for existing submetered premises." OCC Memo Contra at 4-5.

Accordingly, if the Commission grants the tariff amendment proposed by AEP Ohio, the Commission should also provide for an appropriate transition process, including, among other things, cost recovery for necessary expenditures related to transitioning away from submetering.³

CONCLUSION

For the foregoing reasons, AEP Ohio's Motion for Tariff Amendment should be granted, and OAA's and ICSC's Motion to Hold Case in Abeyance should be denied.

Respectfully submitted,
/s/ Steven T. Nourse
Steven T. Nourse
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: 614-716-1608
Fax: 614-716-2950
stnourse@aep.com

Counsel for Ohio Power Company

³ IEU wrongly asserts that any costs AEP Ohio would incur in taking over individual-meter service to submetered premises would already be captured by existing rates. IEU Memo Contra at 7 n.4. But there are many open issues that would have to be addressed in a transition away from submetering, and thus there is no basis for asserting that these costs have already been captured in existing rate structures. Thus, the Commission should provide for an appropriate transition process in which cost recovery issues can be addressed with specificity.

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 *Reply and Memorandum Contra* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 19th day of May 2016, via electronic transmission.

/s/ Steven T. Nourse

Steven T. Nourse

Email Service List:

kyle.kern@occ.ohio.gov
bojko@carpenterlipps.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
slessor@calfee.com
jlang@calfee.com
talexander@calfee.com
misettineri@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com

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Summary: Reply -Ohio Power Company's Reply in Support of its Motion for Tariff Amendment and Memorandum Contra Motion to Hold Case in Abeyance electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company