BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation of Submetering in the State of Ohio	)))	Case No. 15-1594-AU-COI

JOINT APPLICATION FOR REHEARING OF THE SECOND ENTRY ON REHEARING BY OHIO POWER COMPANY AND DUKE ENERGY OHIO, INC.

Pursuant to Ohio Revised Code ("R.C.") Section 4903.10 and Ohio Administrative Code ("O.A.C.") Rule 4901-1-35, Ohio Power Company ("AEP Ohio") and Duke Energy Ohio, Inc. (together "Joint Applicants") respectfully file this Application for Rehearing of the Commission's June 21, 2017 Second Entry on Rehearing in this proceeding.

The grounds for this Application for Rehearing are set forth in the accompanying Memorandum in Support. Accordingly, the Commission should grant rehearing and abrogate or modify its Second Entry on Rehearing to the extent set forth herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The Commission's Second Order on Rehearing gives submetering entities exactly what they asked for in this proceeding: A "Safe Harbor" on the third prong of the *Shroyer Test* if they charge submetering customers no more than what a public utility would charge. Far from protecting customers and ending the many harms caused by submetering, the Commission's decision ensconces the submetering status quo. That is because, as Joint Applicants explained in their first application for rehearing (at 6-7), submetering companies can make a considerable profit (up to 45%) in the difference between master meter rates and the SSO rate that public utilities charge. The fact that submetering companies will continue to profit by charging the SSO rate was confirmed when submetering companies requested precisely this test in their comments. *See* NEP Initial Comments at 4. Thus, the Commission's order will do little to end the many harms of submetering that Joint Applicants have catalogued many times in these proceeding.

As described below, the "Safe Harbor" adopted by the Commission violates applicable case law and statutes and should be abandoned and replaced with a test that focuses on whether an entity is *profiting* from submetering. At a minimum, as further described below, the Commission should clarify several aspects of its Second Entry on Rehearing, including ensuring that submetering entities will be evaluated on a case-by-case basis, and that the second and third prongs of the *Shroyer Test* will apply even if the submetering entity has met the thresholds for

the "Safe Harbor." The Commission should also modify or clarify the Second Order on Rehearing in other ways as described below.

I. The Safe Harbor provision adopted by the Commission is unlawful and unreasonable and should be eliminated, modified, and/or clarified on rehearing.

The Safe Harbor created in the Second Entry on Rehearing is unlawful and unreasonable and should be eliminated on rehearing. It conflicts with the case-by-case approach required under the Supreme Court's case law and as embraced by the Commission in this proceeding. Moreover, its application to a wide range of "Resellers"[1] outside the traditional landlord-tenant context is inconsistent with and unsupported by statute and case law. At a minimum, if it is retained for the limited purposes within prong three of the *Shroyer Test*, the Safe Harbor should be modified and/or clarified. Specifically, the two components of the Safe Harbor test should be applied conjunctively to avoid the potential problem of a Reseller evading the purpose of the price test through an affiliate CRES. Further, a "no markup" restriction should be incorporated for both the Reseller and any CRES affiliates. Finally, the Safe Harbor should be clarified to apply only relative to the third prong of the *Shroyer Test* and without implication for any claims under the first and second prongs.

A. The Safe Harbor violates the case-by-case requirement for the determination of "public utility" status under R.C. 4905.02 and 4905.03.

The Second Entry on Rehearing repeatedly emphasized that the question of whether any specific company is operating as a public utility "must be determined upon the facts of each case." (Second Entry on Rehearing ¶ 21 (citing *Industrial Gas Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 413 (1939)).) The Commission acknowledged that the Supreme Court has held

[1] The Commission has broadly defined the "Resellers" that benefit from the Safe Harbor to include "condominium associations, submetering companies, and other similarly situated entities engaged in the redistribution of public utility services." (Second Entry on Rehearing ¶4.)

that "the determination of whether a particular entity is a public utility is a mixed question of law and fact." (*Id.* (citing *Marano v. Gibbs*, 45 Ohio St. 3d 310, 311 (1989); *A&B Refuse Disposers, Inc. v. Ravenna Twp. Bd. Of Trustees*, 64 Ohio St. 3d 385 (1992)).) The question of whether an enterprise is operating as a public utility is decided by an examination of the nature of the business in which it is engaged. (*Id*. (citing *Industrial Gas*, syllabus paragraph one).) And although the case law provides a list of characteristics common to public utilities, none of those characteristics is controlling and each case must be decided on the facts and circumstances peculiar to it. (*Id*. (citing *Industrial Gas,* 135 Ohio St. at 413; *Montville Bd. Of Twp. Trustees v. WDBN, Inc.*, 10 Ohio App. 3d 284 (1983)).)

Creating a Safe Harbor conflicts with a case-by-case approach to the public utility inquiry. If the result is a true Safe Harbor, then the determination of a company's status as a public utility is no longer on a case-by-case basis. Conversely, if there a true case-by-case approach, then the Safe Harbor has no real value or purpose. The Safe Harbor should be eliminated or clarified to be remain subject to an individual investigation and application of the facts in every case.

In the Second Entry on Rehearing, the Commission found "nothing to suggest that our use of the *Shroyer Test*, on a case-by-case basis, should be abandoned." (Second Entry on Rehearing ¶ 22.) More specifically, the Commission concluded that "[a]ny jurisdictional consumer protections *can only apply after a case-by-case determination* that a particular Reseller is operating as a public utility." (*Id*. ¶ 24 (emphasis added).) This point was even further emphasized by the Second Entry on Rehearing's conclusion that "the Commission *must weigh the facts and circumstances of each case*, and our consideration of whether any individual Reseller is a public utility *must be made after the development of an evidentiary record* in a

complaint case." (*Id*. ¶ 31 (emphasis added).) These unequivocal statements preclude the Commission from establishing a Safe Harbor that prevents a case-by-case determination.

The Second Entry on Rehearing's declaration that the Relative Price Test and Safe Harbor do not apply to commercial and industrial customers (¶ 28) provides additional support for AEP Ohio's position that a case-by-case determination is required as to the Reseller entity (and not on a customer-by-customer basis). The Commission stated that it would apply a case-by-case approach to determine such matters as it relates to commercial/industrial customers. (Second Entry on Rehearing ¶ 28.) The Commission's bifurcated approach is flawed. The statutory definition of "public utility" makes no distinction between residential and other customer classes. *See* R.C. 4905.02. Further, if an entity is operating as a public utility for some customers, it is a public utility for all purposes. Indeed, all of the Supreme Court and Commission quotations from the first and third paragraph of this subargument (Prop. I.A) demonstrate that the "public utility" query is based on the Reseller entity in question and is not based on a customer-by-customer (or customer class by customer class) approach. There is no basis for such a distinction, and the Commission should eliminate the Safe Harbor while reinforcing the relevant factors to be considered on a case-by-case basis.

B. The Safe Harbor is fundamentally flawed because an affiliate of the submetering entity can charge any price it wishes and avoid the price protection ostensibly intended by the Relative Price Test.

The first branch of the Safe Harbor permits a Reseller to pass through to its customers the amount it paid for utility services – even if that price exceeds the comparable retail price. Thus, the Relative Price Test essentially has an exception for a Reseller if it overpays for utility services. This result is both perverse and illogical. Creating a rule that actually sanctions evasion of the same rule is illogical, not to mention highly ineffective; the pricing test that ostensibly imposes a limitation on pricing actually creates a Safe Harbor for a company that

simply shifts its abusive pricing one transaction removed from the retail customer. More importantly, it sanctions abusive pricing practices through the use of an affiliate CRES.

In this regard, it is significant that the leading submetering company, Nationwide Energy Partners (NEP), has recently established an affiliate CRES. (*Optimum Power Investments, LLC*, Case No. 17-674-EL-CRS.) Thus, NEP is well-positioned to operate within the Safe Harbor yet charge any price it wishes and achieve any level of profit that it can get away with. This should be unacceptable under any reasonable view of submetering. Surely, that was not the result the Commission intended when it stated in its press release accompanying the Entry that the decision "will serve to protect customers" and will provide "a true venue for submetered residential customers to file their grievances." (June 21, 2017 Media Release *PUCO Provides Pricing Protections to Submetered Customers* at 1.) The unfortunate reality, however, is that the Safe Harbor provision as written does not provide any meaningful consumer protection.

The simplest way to fix the affiliate CRES problem would be to change the "or" between the two branches of the Safe Harbor to an "and." This would mean that the Reseller would only operate within the Safe Harbor if it (1) passes through charges it pays for utility service without a markup ***and*** (2) those charges do not exceed the comparable rate level of the local public utility. Because the current Safe Harbor is triggered by either the first or the second branch of the test, it is flawed and easily evaded. Accordingly, if it is to be retained on rehearing, the Safe Harbor should, at a minimum, be modified to make both branches of the test conjunctive. To be clear, however, that only serves to solve part of the problem and is thus not the desired result. But it is a significant step that would close a gaping loophole in the existing Safe Harbor provision.

The remaining problem is that a Reseller can still enjoy significant profit levels under the Relative Pricing Test. Even if the two components of the Safe Harbor are applied conjunctively,

the result would still be that the Reseller can charge up to the level of the local utility rates – which means that the Reseller can still receive unregulated profits approaching 45%, as AEP Ohio previously demonstrated in this docket. (*See* Joint Application for Rehearing of Ohio Power Company et al. at 7.) That larger problem can only be fixed by imposing a "no markup" restriction on both a Reseller and its affiliate. In other words, the Reseller and its CRES affiliate would both have to refrain from marking up the prices paid for utility services being sold. More specifically, the affiliate CRES would have to charge the price it paid without markup and the Reseller would have to limit its retail charges to the costs incurred in purchasing the input utility services. As AEP Ohio has consistently maintained in this docket, only a Reseller providing utility services without profit can properly be considered exempt from being a "public utility" under R.C. 4905.02 and 4905.03. But unless that rule is applied to both a Reseller and its affiliate CRES, it can easily be circumvented.

Further, because even an unaffiliated CRES could facilitate this same result through "kickback" payments, the Commission should specify that the price paid by the Reseller to a CRES provider (either affiliated or non-affiliated) should be calculated on a "net basis." In other words, if the CRES and the Reseller are making payments to each other as a result of the Reseller purchasing input services to support its offerings to retail customers, the net of the payment streams should be considered the purchase price that cannot be marked up. For example, if a Reseller pays $100 for a service it resells to a retail customer but the CRES pays a $20 fee to the Reseller, the net price the Reseller paid would be $80 – which could not be marked up when it resells to retail customers.

In sum, if the Commission retains the Safe Harbor on rehearing, it should be modified as outlined above.

C. The Commission should clarify that the Safe Harbor applies only to the third prong of the *Shroyer Test,* and a submetering entity can still be deemed a public utility under the first and second prongs even if it is within the Safe Harbor under the third prong.

The December 7, 2016 Finding and Order confirmed that an affirmative answer to any one of the three prongs of the *Shroyer Test* may be sufficient to demonstrate that an entity is operating as a public utility subject to the Commission's jurisdiction. (Finding and Order ¶ 16; Second Entry on Rehearing ¶ 4.) Moreover, in the Second Entry on Rehearing, the Commission indicated that the Relative Price Test and the Safe Harbor are created under the third prong of the *Shroyer Test*. (Second Entry on Rehearing ¶ 40.) Thus, it follows that the Relative Price Test and Safe Harbor have no effect on the first and second prongs of the *Shroyer Test*, such that a Reseller that operates within the Safe Harbor could still be subject to a claim that it is acting as a public utility under the first or second prong of the *Shroyer Test*. At a minimum, the scope of the Safe Harbor should be clarified in this regard.

Based on its name alone, the Safe Harbor could be misinterpreted as insulating a Reseller from the Commission's jurisdiction. And the Second Entry on Rehearing does indicate that a Reseller operating within the Safe Harbor will overcome the rebuttable presumption and not be subject to the Commission's jurisdiction. But a more careful reading of the language suggests that the scope of the Safe Harbor was more narrowly intended – and rightly so.

In both Paragraphs 40 and 50 of the Second Entry on Rehearing, the Commission included the phrase "under the third prong" when making these statements about a Reseller avoiding Commission jurisdiction. Specifically, the Commission indicated that "[a] Reseller will overcome the rebuttable presumption and thus will not be subject to Commission jurisdiction *under the third prong* of the *Shroyer Test* if the Reseller demonstrates . . . ." (Second Entry on Rehearing ¶ 40 (emphasis added).) Similarly, the Commission indicated that "[t]he Reseller,

however, will avoid Commission jurisdiction *under the third prong* of the *Shroyer Test* if it can prove that it falls within one of the Safe Harbor provisions described above." (*Id*. ¶ 50 (emphasis added).) To avoid any confusion about the scope and impact of the Safe Harbor provision (if it is retained on rehearing), the Commission should clarify that the Safe Harbor only relates to the third prong of the *Shroyer Test* and does not affect a Reseller's status under the first or second prong of the *Shroyer Test*; stated differently, a Reseller that operates within the Safe Harbor remains subject to a case-by-case investigation regarding the first and second prongs of the *Shroyer Test*.

II. It was unreasonable and unlawful for the Commission to suggest that the result of an unrebutted presumption is to trigger Commission jurisdiction over a submetering company, since an entity operating as a public utility under those circumstances is violating the law and should immediately cease and desist.

The Second Entry on Rehearing (at ¶ 50) suggested that, if the rebuttable presumption is triggered and a Reseller is not operating within the Safe Harbor, this situation "would invoke Commission jurisdiction over the Reseller." The Commission also indicated (at ¶ 49) that an unrebutted presumption could trigger Commission disclosure requirements for submetering. In other words, the Commission is saying that it would have regulatory jurisdiction over a submetering company as a "public utility" if the presumption is triggered and unrebutted. That conclusion is both unreasonable and unlawful.

It is unreasonable to suggest that there will be an ad hoc set of currently-undefined regulations to be applied at a future time for a single company if the presumption is triggered and unrebutted. In addition, it is especially illogical for disclosure regulations. Whatever harm is done by a submetering company to a customer or group of customers when it violates the presumption is already done and an after-the-fact disclosure will not remedy that situation. As a practical matter, the imposition of disclosure requirements is probably the least intrusive

regulatory action to the business model of submetering companies – and likely also the least effective measure of regulation. More importantly, however, these statements in the Second Entry on Rehearing miss the point that a submetering company acting as a public utility is violating the law; *such conduct must be terminated, not regulated*.

If a submetering company operates as a "public utility" under R.C. 4905.02 and 4905.03, it violates several provisions within Title 49, including by illustration the following:

- The Certified Territory Act excludes other public utilities from operating within a certified territory (R.C. 4933.81-4933.90)
- The annual financial assessment must be paid by all public utilities (R.C. 4905.10)
- Public Utilities are required to keep accounting records in accordance with Commission standards (R.C. 4905.13)
- Every public utility must furnish an annual report to the Commission (R.C. 4905.14)
- Each public utility shall furnish to the public utilities commission, in such form and at such times as the commission requires, such accounts, reports, and information as shall show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public. (R.C. 4905.15)
- Every public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them. (R.C. 4905.30)
- No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. (R.C. 4905.32)
- A public utility which is an electric light company may, only when authorized by an order of the public utilities commission and not otherwise, issue notes, or other evidences of indebtedness payable. (R.C. 4905.40-4905.41)
- No public utility or railroad shall declare any stock, bond, or scrip dividend or distribution, or divide the proceeds of the sale of any stock, bond, or scrip among its stockholders, unless it is authorized to do so by the public utilities commission. (R.C. 4905.46)
- Except with the consent and approval of the Commission, a public utility cannot enter into certain transactions with another public utility. (R.C. 4905.48)

If a Reseller is acting as a public utility and the presumption has been triggered and unrebutted, the Reseller/public utility has already been violating these requirements. These affirmative legal obligations of a public utility are not optional or lightly imposed. The General Assembly has provided that "[n]o officer, agent, or employee in an official capacity of a public

utility or railroad shall knowingly violate sections 4905.01 to 4905.07, inclusive, 4905.14 to 4905.19, inclusive, 4905.22 to 4905.51, inclusive, 4905.54 to 4905.57, inclusive, or 4905.60 to 4905.63, inclusive, of the Revised Code." (R.C. 4905.56) Moreover, violating R.C. 4905.56 is a felony of the fifth degree. (R.C. 4905.99(B)) As to the Certified Territories Act, the General Assembly provided that "[a]ny electric supplier that renders electric service in violation of sections 4933.81 to 4933.90 of the Revised Code is subject to remedies and penalties provided by sections 4905.54, 4905.56, 4905.57, 4905.59, 4905.60, and 4905.61 and division (B) of section 4905.99 of the Revised Code." (R.C. 4933.86)

Thus, it is wholly insufficient for the Second Entry on Rehearing to vaguely conclude that its jurisdiction will be triggered or that it will "regulate" submetering companies that operate as public utilities. Instead, the requisite legal mandate for an ongoing violation of the law is that the submetering company cease and desist those activities. Further, in their January 6, 2017 Joint Application for Rehearing, the Electric Distribution Utilities outlined a proposal (at page 13) for transitioning away from such submetering company activities. (*See* Joint Application for Rehearing of Ohio Power Company et al. at 13.) On rehearing, the Commission should provide that the consequence of an unrebutted presumption will be that ongoing unlawful activities must immediately cease.

III. The Second Entry on Rehearing is inconsistent with statutes defining "public utility."

A. As formulated, the Commission's Relative Price Test and Safe Harbor violate R.C. 4905.02 and 4905.03.

Section 4905.03(C) of the Revised Code provides that an entity constitutes an "electric light company" if it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state." A key aspect of this definition is whether the entity is "*engaged in the business*" of supplying utility service. This draws a distinction between

(a) entities that are providing utility service, but not "engaged in the business" of doing so, and (b) entities whose "business" involves the provision of utility services.

The most straightforward way of applying those concepts is to focus on whether the entity is making a profit from providing utility service. A landlord or submetering entity that marks up master meter service and resells it to tenants at a profit is, straightforwardly, "*engaged in the business* of supplying electricity for light, heat, or power purposes to consumers within this state." R.C. 4905.03(C) (emphasis added). By contrast, a landlord who merely passes through his own electricity costs without markup is not "engaged in the business" of supplying electricity – he may be supplying electricity, but not as a "business." This understanding is confirmed by the fact that the Revised Code expressly exempts not-for-profit electric utilities from the definition of utility service. *See* R.C. 4905.02(A)(1) ("public utility" excludes an "electric light company that operates its utility *not for profit*" (emphasis added)).

The Commission's Relative Price Test and Safe Harbor, however, are inconsistent with R.C. 4905.02 and .03 because they permit submetering entities to earn substantial profit while escaping regulation as a "public utility." As described in previous filings and in detail below, a "zero percentage threshold for the Relative Price Test" (Second Entry on Rehearing ¶ 1) allows submetering entities to earn considerable profit while remaining within the "Safe Harbor." That is directly at odds with R.C. 4905.02 and 4905.03.

The inconsistency between the Safe Harbor and the governing statutes is clearest in the context of submetering companies such as NEP. These are large for-profit companies that sell electric service to thousands of tenants.[2] NEP's CEO has admitted that the company views itself

[2] Nationwide Energy Partners boasts on its website that it serves 30,000 residents in 140 multifamily communities. *See* https://nationwideenergypartners.com/about-us/.

as the "new utility." (*See* OCC Initial Cmts. Attach. 1, at 4.) The idea that NEP and similar entities are *not* "engaged in the business of supplying electricity," R.C. 4905.03(C), is difficult to fathom. Yet the Commission's Relative Price Test and Safe Harbor will only help NEP and similar entities to escape regulation as public utilities while earning substantial profits. That violates the plain language of 4905.03(C). When entities are "engaged in the business of supplying electricity," they must be deemed "public utilities" under Ohio law. By adopting a test that would allow businesses to supply utility service at a considerable profit without being regulated as a public utility, the Second Entry on Rehearing is unlawful.

B. The Second Entry on Rehearing is unreasonable and unlawful under R.C. 4903.09 because it failed to address arguments concerning the governing statues.

Under R.C. 4903.09, the Commission is required to address arguments made by all parties and to "set forth in its order its reasons in sufficient detail to enable the Supreme Court, upon appeal, to determine how the commission reached its decision." *E.g.*, *Gen. Tele. Co. v. Pub. Utils. Comm.*, 30 Ohio St. 2d 271, 277 (1972). The Supreme Court of Ohio has held that there must be a rationale and record supporting the Order, in order to avoid violating R.C. 4903.09. *Indus. Energy Users-Ohio v. PUC*, 117 Ohio St. 3d 486, 493 (2008) (quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312 (1987); *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 90 (1999); *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St. 3d 163, 166 (1996).

In their application for rehearing, the utility Joint Applicants argued that a submetering entity that marks up master meter service and resells it at a profit is "engaged in the business of supplying electricity" under R.C. 4905.02 and 4905.03. (*See* Application for Rehearing of Ohio Power Company et al. at 9-10.) Joint Applicants explained that "the Commission's proposed test is at odds with the statutory definition because, as described above, it would allow a submetering

company to continue to make substantial profit through resale of electric service, and thus continue to be "engaged in the business" of supplying electricity." (*Id.* at 10.)

Yet the Second Entry on Rehearing does not seriously engage with R.C. 4905.02 and 4905.03 or address how the Safe Harbor is consistent with the "engaged in the business of supplying electricity" standard. The Second Entry on Rehearing cites previous Ohio Supreme Court cases on this subject, but these cases were extremely limited and do not in any way contemplate a "Safe Harbor" that would allow entities to sell utility service for profit yet escape regulation as a "public utility." Cases such as *Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 2006-Ohio-2989, and *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371, 2002-Ohio-4847, did <u>*not*</u> address new forms of submetering or submetering companies such as NEP. Rather, as the Second Entry on Rehearing itself recognizes, these cases were limited to "the resale of electric service by a landlord to a tenant if the resale took place only on the landlord's property." Second Entry on Rehearing ¶ 23; *see also Pledger*, 2006-Ohio-2989, ¶ 1, 17 (applying R.C. 4905.03 and the *Shroyer Test* in the context of a landlord-tenant relationship); *FirstEnergy*, 2002-Ohio-4847, ¶¶ 10-11 (addressing the resale of electric service by a landlord to a tenant upon property owned by the landlord); *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1, 5 (1965) (addressing shopping center landlords' resale of submetered electricity to their tenants). As noted above, an entity such as NEP, which sells electric service to 30,000 customers on over one hundred properties, is clearly "engaged in the business of supplying electricity," not a landlord reselling on his own property. Supreme Court case law has never

addressed entities such as NEP,[3] yet the Commission's Safe Harbor goes far beyond the text of the statute to allow NEP to profit immensely without being deemed a public utility.

IV. On rehearing, the Commission should reject the "zero percentage threshold" and the Relative Price Test and adopt a revised test that applies a rebuttable presumption that a submetering entity is a public utility if it charges more than what it pays for master meter service.

As noted above, in establishing a "zero percentage threshold for the Relative Price Test" (Second Entry at 1), the Second Entry on Rehearing violates R.C. 4905.02 and 4905.03 by permitting submetering entities to earn substantial profit while escaping regulation as a "public utility." It is also unlawful and unreasonable because it will not contribute toward stemming the proliferation of submetering or ending the numerous customer harms that submetering causes. On hearing, the Commission should adopt the test proposed by the utilities: That is, the Commission should apply a rebuttable presumption that a submetering entity is a public utility if it marks up master meter service and makes a profit from submetering.

Although the Second Entry on Rehearing is not clear about this, adopting the "zero percentage threshold" is *a ruling in favor of submetering*. The "zero percentage threshold" is the threshold that submetering companies like NEP advocated that the Commission adopt. (*See* NEP Initial Comments at 4.) As the utilities have explained before, the reason that NEP advocated for a zero percentage threshold is that NEP can earn a considerable profit – and continue its harmful business model – by charging prices at this threshold. Indeed, as noted above, and as the utilities pointed out in their first Application for Rehearing, the difference between the master meter price that NEP and other entities pay for electrical service in AEP Ohio's service territory and

[3] Further, the Supreme Court case law cited by the Second Entry on Rehearing did not address condominium complexes, which the Commission has also made subject to the Relative Price Test and the Safe Harbor.

the SSO price that keeps NEP within the "Safe Harbor" allows NEP to earn *nearly a 45% profit.* (*See* Joint Application for Rehearing of Ohio Power Company et al. at 7.) Accordingly, the Second Entry on Rehearing will allow NEP and other submetering entities to enjoy a Safe Harbor while still charging prices that allow them to continue their business model.

Rather than giving submetering entities a Safe Harbor for maintaining their current business model, the Commission should instead hold that any submetering entity that profits from reselling electric service is a "public utility." As described above, this test is consistent with the plain language of 4905.03(C), which requires all entities that are "engaged in the business of supplying electricity" to be deemed public utilities. Further, the test is more fair to submetering customers because it more accurately reflects the product they are receiving. As the utilities have noted many times in this docket, submetering customers lack many of the services and protections provided to public utility customers. Customers should not pay the same price for inferior service. Whereas the "zero percentage threshold" is a ruling in favor of submetering entities, the utilities' revised test is likely to curtail unregulated submetering in this State and alleviate many of the substantial harms it causes.

V. The Commission should not foreclose other avenues of addressing submetering, such as utility tariffs.

The Commission should clarify on rehearing that its decisions in this docket do not limit or foreclose other avenues of addressing submetering, including utility tariffs concerning that issue. As the Commission noted in its Second Entry on Rehearing, the Residential Advocates have argued that "the Commission erred by not requiring Ohio EDUs to adopt tariffs that prevent abuses of residential consumers arising from submetering arrangements * * *." (Second Entry on Rehearing ¶ 18.) The Commission did not discuss the substance of that assignment of error, other than to note that "any assignments of error not specifically addressed by the Commission

are hereby expressly denied." (*Id.* ¶ 10.) AEP Ohio agrees that the Commission did not err in declining to impose an affirmative submetering tariff requirement on EDUs. AEP Ohio requests, however, that the Commission clarify on rehearing that in declining to affirmatively *require* submetering tariffs, the Commission has not foreclosed the use of such tariffs (or other means not specifically addressed in the Commission's decisions in this proceeding) to limit submetering.

AEP Ohio has filed a motion to amend its tariff to limit submetering in another pending Commission proceeding. *See The Office of the Ohio Consumers' Counsel v. Ohio Power Company*, Case No. 16-0782-EL-CSS, Ohio Power Company's Mot. for Tariff Am. (Apr. 27, 2016). Specifically, AEP Ohio has sought to amend its tariff to state that it will not provide electric service to any submetered premises where a landlord, condominium association, "submetering company," or any other entity is assessing a markup or separate charge to individual tenants or occupants. *Id.* As AEP Ohio explained in that motion and its reply memorandum in support thereof, both of which AEP Ohio expressly incorporates by reference here, the Commission has the authority to use its existing jurisdiction over public utilities to amend an public utility's tariff to limit submetering because the Commission has full jurisdiction over the "master meter" service that the public utility provides to the submetered premises. *Id.* at 5-9; Ohio Power Company's Reply in Support of Mot. for Tariff Am. at 2-7 (May 19, 2016). The Commission does not need to consider the substance of AEP Ohio's motion to amend its tariff in this proceeding; the motion has been fully briefed and is ripe for adjudication in Case No. 16-0782-EL-CSS. AEP Ohio merely respectfully requests that the Commission clarify and confirm on rehearing here that the Commission's decision in this docket in no way forecloses

AEP Ohio's – or any utility's – ability to begin to limit the substantial harms of submetering through tariffs or other means not specifically addressed in this case.

VI. The Commission's requirement for utilities to assist Staff in the creation of a website tool or other mechanism to be utilized by submetered residential customers is unprecedented, unreasonable, and unduly burdensome.

In its Second Entry on Rehearing, after rejecting the utilities' proposed revision to the rebuttable presumption proposed by the Commission, the Commission orders the utilities to help Staff develop a brand-new, vaguely described "website tool or other mechanism" that customers can use to apply a Relative Price Test that the utilities did not advocate for—a flawed test that will not curb the submetering activities that are causing substantial harm to customers. Specifically, the Commission states:

> In order to facilitate an orderly and expedient resolution of any potential complaints, the electric, gas, water and sewer distribution utilities are directed to work with Staff to develop a website tool or other mechanism to provide submetered residential customers with an estimated calculation of what the customer would have paid the local public utility for equivalent usage, on a monthly bill basis, under the utility's default service tariffs.
> ***
> Thus, in any given case, the rebuttable presumption will be invoked where the Reseller charges the submetered residential customer more than the customer would have paid the local public utility under the default service tariff for the equivalent usage on a total bill basis.

Second Entry on Rehearing ¶ 41, 49. For several reasons, the Commission's order for utilities to bear the substantial costs and burdens associated with the development of this new "website tool or other mechanism" is unreasonable and should be eliminated on rehearing.

As a threshold matter, the Commission's order for entities *not subject to the Commission's investigation* to shoulder all the costs and burdens associated with developing a website like this appears to be unprecedented. AEP Ohio is aware of no prior Commission

investigation in which entities *besides those being investigated* have been ordered to devote as-yet unknown (but likely substantial) time and resources to developing a new online tool to help identify not any improper conduct of their own, but rather the improper conduct of the investigation's targets. Certainly, the Commission has ordered utilities to work cooperatively with Staff on websites in prior investigations, but those directives have arisen in contexts where the utilities were providing website access to their own customers; not where, as here, the utilities are being compelled to help build a website tool that is intended to ensure compliance with Commission orders by unregulated entities such as the submetering companies being investigated here. *E.g., In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order, ¶ 36 (March 26, 2014) (directing Staff and the EDUs to continue to work together in developing a website registration system that ensures customer protections on a utility-by-utility basis).

The Commission's vague directive to develop a "website tool or other mechanism" for use by submetered residential customers also fails to account for any of the substantial costs and liabilities associated with the development of any new website, including the costs associated with planning, designing, creating, and maintaining the website. Moreover, depending on the structure of the tool or mechanism, there may also be a need to address the substantial privacy concerns that arise under state and federal law whenever a website collects personally identifiable information from customers. It is unclear from the Second Entry on Rehearing where the website tool or mechanism would be hosted, or who would be responsible for maintaining it. To the extent that any of those responsibilities are expected to be borne by the utilities, and given the patchwork legal framework for privacy-related liabilities, the creation of internal policies and other procedures to address these concerns can require significant legal and

corporate investment. In addition to these practical considerations that arise with respect to any website, there are significant, ongoing administrative headaches to consider. Presumably, the utilities would have to update this new website tool or mechanism every time a tariff update or rate change took effect that would change the default residential tariff rate that a submetering customer would pay its local public utility for equivalent usage – in other words, for many utilities, on a monthly basis.

As the foregoing considerations reflect, it is unreasonable and simply unfair for the Commission's order to develop a "website tool or other mechanism" to be directed solely at the electric, gas, water and sewer distribution utilities—without any contribution of information or resources by the submetering entities whose very conduct is at issue in this investigation. The submetering entities—not the regulated community—should bear the costs relating to any online triage of customer complaints concerning possible overcharges. State law, after all, expressly anticipates that the party "at fault" shall pay the expenses incurred by the Commission during Commission investigations. R.C. 4903.24. Although that law also gives the Commission discretion to divide fees, expenses, and costs of investigation "among any parties to the record in such proportion as the commission determines," the utilities respectfully submit that the Commission abused its discretion in the Second Entry on Rehearing by apparently requiring the utilities to absorb all of the costs and burdens of the desired website tool or other mechanism envisioned here.

Although the Commission does not say so in its Second Entry on Rehearing, it is possible that by directing the utilities (and not the submetering entities) to work with Staff on the desired website, the Commission legitimately hopes to avoid a "fox-guarding-the-henhouse" problem. To be sure, input from the regulated community concerning any website tool that is yet to be

developed in this proceeding will be critical to ensure that submetering entities do not purposefully engineer a customer-facing website in a manner that will artificially or improperly reduce those entities' exposure to legitimate customer complaints concerning overcharges. But the utilities can provide that input, under the Commission's supervision, without shouldering the costs, burdens, and risks of developing the website in the first place.

For the foregoing reasons, AEP Ohio respectfully asks the Commission to grant rehearing and reconsider that portion of its Second Entry on Rehearing directing the utilities to work with Staff on a website tool or other mechanism to be used by submetered residential customers.

CONCLUSION

For the foregoing reasons, the Commission should grant rehearing and abrogate or modify its Second Entry on Rehearing to the extent set forth herein.

Respectfully submitted,

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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 *Application for Rehearing* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 21st day of July, 2017, via electronic transmission.

/s/ Steven T. Nourse
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Summary: App for Rehearing of the Second Entry on Rehearing and Memorandum in Support electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company and Duke Energy Ohio, Inc.