

FILE

## IN THE SUPREME COURT OF OHIO

Cynthia Wingo,	:	
	:	
Appellant,	:	Case No. <u>19-0274</u>
	:	
v.	:	Appeal from the Public Utilities
	:	Commission of Ohio
The Public Utilities Commission of Ohio,	:	
	:	Public Utilities Commission of Ohio
Appellee.	:	Case No. 16-2401-EL-CSS

## NOTICE OF APPEAL OF CYNTHIA WINGO

Mark A. Whitt  
 (Reg. No. 0067996)  
 Counsel of Record  
 Rebekah Glover  
 (Reg. No. 0088798)  
**WHITT STURTEVANT LLP**  
 88 E. Broad St., Suite 1590  
 Columbus, Ohio 43215  
 614.224.3911  
 614.224.3960 (f)  
 whitt@whitt-sturtevant.com  
 glover@whitt-sturtevant.com

**COUNSEL FOR APPELLANT,  
 CYNTHIA WINGO**

Dave Yost  
 (Reg. No. 0056290)  
 Ohio Attorney General  
 William L. Wright  
 (Reg. No. 0018010)  
 Section Chief  
 Public Utilities Section  
 180 East Broad St., 6<sup>th</sup> floor  
 Columbus, OH 43215-3793  
 Telephone: (614) 466-4397  
 Fax: (614) 644-8764  
 william.wright@ohioattorneygeneral.gov

**COUNSEL FOR APPELLEE,  
 PUBLIC UTILITIES COMMISSION  
 OF OHIO**

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### **Notice of Appeal of Cynthia Wingo**

Appellant Cynthia Wingo is the Complainant in Case No. 16-2401-EL-CSS before the Public Utilities Commission of Ohio. On November 21, 2017, the Commission issued a Finding and Order dismissing the Second Amended Complaint. (Attachment A.) Appellant hereby provides notice of appeal of the November 21, 2017 Finding and Order, in accordance with R.C. 4903.11, 4903.12, 4903.13, and S.Ct.Prac.R. 10.02(A).

The Second Amended Complaint (Complaint) alleges that the Respondents, individually or collectively, are unlawfully engaged in the business of a “public utility” or, alternatively, as providers of one or more service components of “competitive retail electric service.” *See* R.C. 4905.02, 4905.03, 4928.01(A)(4). As set forth in Appellant’s application for rehearing of December 21, 2017, the Commission’s order dismissing the Complaint is unreasonable and unlawful because:

1. The Commission offers no facts or reasoning for the dismissal of claims and parties that were not addressed in [Respondent] NEP’s motion to dismiss, which violates R.C. 4903.09.
2. The Commission failed to apply the proper standard for review in determining whether “reasonable grounds for complaint” are stated in the [Complaint], which violates R.C. 4905.26.
3. The Commission improperly and prematurely addressed the merits of the Complaint (i) without prior notice that it intended to do so at the pleading stage, (ii) without affording Complainant the opportunity to take discovery, and (iii) without conducting an evidentiary hearing, which violates R.C. 4903.082, 4903.22, and 4905.26.

Appellant’s application for rehearing of the November 21, 2017 Finding and Order was processed by the Commission’s online filing system at 5:47 p.m. on December 21, 2017. On January 17, 2018, the Commission issued an Entry on Rehearing asserting it lacked jurisdiction to consider the application for rehearing because it was not “filed” on or before 5:30 p.m.

(Attachment B at ¶ 15.) The same entry granted an application for rehearing of intervenor Ohio Power Company “for further consideration of the matters specified.” (*Id.* at ¶ 1.)

On February 16, 2018, Appellant filed a second application for rehearing. The second application for rehearing alleges the January 17, 2018 Entry on Rehearing is unreasonable and unlawful because:

The Commission violated R.C. 4903.10 by refusing to exercise jurisdiction to consider Ms. Wingo’s application for rehearing on the merits.

On March 14, 2018, the Commission granted the second application for rehearing “for further consideration of the matters specified” in the Second Entry on Rehearing (Attachment C at ¶ 1.) On January 9, 2019, the Commission denied Appellant’s second application for rehearing in the Third Entry on Rehearing. (Attachment D.)

Appellant respectfully requests an order from this Court finding that Appellant’s application for rehearing of the November 21, 2017 Finding and Order was timely “filed” in accordance with R.C. 4903.10; that the November 21, 2017 Finding and Order is unreasonable and unlawful; that the January 17, 2018 Entry on Rehearing is unreasonable and unlawful; and granting all other necessary and proper relief.

Respectfully submitted,

/s Mark A. Whitt  
Mark A. Whitt (0067996)  
Rebekah Glover (0088798)  
WHITT STURTEVANT LLP  
88 E. Broad St., Suite 1590  
Columbus, Ohio 43215  
614.224.3911  
614.224.3960 (f)  
whitt@whitt-sturtevant.com  
glover@whitt-sturtevant.com  
**COUNSEL FOR APPELLANT,  
CYNTHIA WINGO**

**CERTIFICATE OF FILING**

I hereby certify that, in accordance with S.Ct.Prac.R. 3.11(D)(2), the foregoing Notice of Appeal has been filed with the Docketing Division of the Public Utilities Commission of Ohio by leaving a copy at the office of the Commission in Columbus, Ohio, in accordance with Ohio Adm. Code 4901-1-02(A) and 4901-1-36, on February 21, 2019.

/s Mark A. Whitt

Mark A. Whitt  
Counsel for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal of Cynthia Wingo was served upon the parties of record to the proceeding before the Public Utilities Commission of Ohio listed below and pursuant to S.Ct.Prac.R. 3.11(B)(2) and 3.11(D)(1)(a) and R.C. 4903.13 on February 21, 2019, via electronic transmission, hand delivery or first class U.S. mail, postage prepaid.

/s Mark A. Whitt

Mark A. Whitt  
Counsel for Appellant  
Cynthia Wingo

Dave Yost  
Ohio Attorney General  
William L. Wright  
Section Chief  
Public Utilities Section  
180 East Broad St., 6<sup>th</sup> floor  
Columbus, OH 43215-3793  
william.wright@ohioattorneygeneral.gov

**COUNSEL FOR PUBLIC UTILITIES  
COMMISSION OF OHIO**

Michael J. Settineri  
Gretchen L. Petrucci  
Ilya Batikov  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street, P.O. Box 1008  
Columbus, OH 43216-1008  
mjsettineri@vorys.com  
glpetrucci@vorys.com  
ibatikov@vorys.com

**COUNSEL FOR NATIONWIDE  
ENERGY PARTNERS, LLC**

Christopher J. Allwein  
Timothy A. Kelley  
Kegler Brown Hill & Ritter, LPA  
65 East State Street Suite 1800  
Columbus, OH 43215  
callwein@keglerbrown.com  
tkelley@keglerbrown.com

**COUNSEL FOR CRAWFORD  
HOYING, LTD.**

Roger P. Sugarman  
Kegler Brown Hill & Ritter, LPA  
65 East State Street Suite 1800  
Columbus, OH 43215  
rsugarman@keglerbrown.com

**COUNSEL FOR BORROR  
PROPERTIES MANAGEMENT, LLC**

Steven T. Nourse  
Christen M. Blend  
1 Riverside Plaza 29th Floor  
Columbus, OH 43215  
stnourse@aep.com  
cmblend@aep.com

**COUNSEL FOR AEP OHIO**

**ATTACHMENT A**

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**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
CYNTHIA WINGO,**

**COMPLAINANT,**

**CASE NO. 16-2401-EL-CSS**

**v.**

**NATIONWIDE ENERGY PARTNERS, LLC,**

**RESPONDENT.**

**FINDING AND ORDER**

Entered in the Journal on November 21, 2017

**I. SUMMARY**

{¶ 1} The Commission finds that the amended complaint filed on September 19, 2017 should be dismissed for failure to state reasonable grounds as required by R.C. 4905.26, as the resale of utility service at the Gateway Lakes Apartments in Grove City, Ohio, as alleged in the complaint and admitted by Nationwide Energy Partners, LLC, falls within the safe harbor provisions established in the Commission's June 21, 2017 Second Entry on Rehearing in the Commission's Investigation of Submetering, Case No. 15-1594-AU-COI.

**II. APPLICABLE LAW**

{¶ 2} Pursuant to R.C. 4905.26, the Commission has authority to consider a written complaint against a public utility by any person or corporation regarding any rate, service, regulation, or practice affecting or relating to any service furnished by that public utility that is unreasonable, unjust, insufficient, or unjustly discriminatory or preferential.

{¶ 3} In 1992, the Commission adopted a three-part test for determining whether a company is acting as a public utility and, therefore, should be subject to the jurisdiction of this Commission in *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) (*Shroyer Test*). The *Shroyer Test*, which was affirmed by the Supreme Court of Ohio as reasonable in *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶18, is as follows:

- (a) Has the landlord manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right-of-way for utility purposes?
- (b) Is the utility service available to the general public rather than just to tenants?
- (c) Is the provision of utility service ancillary to the landlord's primary business?

{¶ 4} In addition to waterworks companies, the *Shroyer Test* has been applied to the provision of electric utility service. See, *In re Pledger*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004); *In re Brooks*, Case No. 94-1987-EL-ATA, Opinion and Order (May 8, 1996); *In re FirstEnergy*, Case No. 99-1212-EL-ETP, et al., Entry (Nov. 21, 2000); *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶10, 18.

{¶ 5} On December 7, 2016, the Commission issued a Finding and Order in Case No. 15-1594-AU-COI, which clarified that failure of any one of the three prongs of the *Shroyer Test* is sufficient to demonstrate that an entity is unlawfully operating as a public utility. *In re the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Finding and Order (Dec. 7, 2016). On June 21, 2017, the Commission issued a Second Entry on Rehearing holding that a company that resells or redistributes a particular utility service to a submetered residential customer (Reseller), and charges an amount that is greater than what the submetered residential customer would have been charged through the local public utility's default service tariffs, a rebuttable presumption will exist that the Reseller is acting as a public utility under the third prong of the *Shroyer Test*. The rebuttable presumption can be overcome if the Reseller can prove that (1) the Reseller is simply passing through its annual costs of providing a utility service charged by a local public utility and competitive retail service provider (if applicable) to its submetered residents at a given



premises; or (2) the Reseller's annual charges for a utility service to an individual submetered resident do not exceed what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs. *In re the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Second Entry on Rehearing (Jun. 21, 2017) ¶40 at 15 (COI Entry on Rehearing).

### III. PROCEDURAL HISTORY

{¶ 6} On December 15, 2016, this complaint was filed on behalf of Cynthia Wingo (Complainant or Ms. Wingo) against Nationwide Energy Partners, LLC (NEP). According to her complaint, Ms. Wingo rented a residential apartment in the Gateway Lakes Apartments in Grove City, Ohio (Gateway Lakes), for which NEP supplies or arranges for the supply of electric, water, and sewer service to Gateway Lakes residents. The complaint further asserts that NEP is an "electric light company" under R.C. 4905.03(C), a "water-works company" under R.C. 4905.03(G), a "sewage disposal system company" under R.C. 4905.03(M), and a "public utility" under R.C. 4905.02. The complaint requests, inter alia, that the Commission find NEP to be a jurisdictional public utility, and order that NEP refund the difference between the rates charged Ms. Wingo by NEP and a lawful rate, as determined by the Commission, subject to treble damages under R.C. 4905.61. NEP filed an answer on January 5, 2017, denying that it provides jurisdictional public utility services.

{¶ 7} On July 19, 2017, Ms. Wingo filed a motion for leave to amend her complaint in response to the Commission's COI Entry on Rehearing regarding submetered arrangements to be used in conjunction with the *Shroyer Test* for determining the jurisdictional question of whether a company is acting as a public utility. *Commission's Investigation of Submetering*, Case No. 15-1594-AU-COI, Second Entry on Rehearing (Jun. 21, 2017). The Complainant also sought to amend her complaint to add Gateway Lakes Acquisition LLC (GLA) and Borrer Properties Management, LLC (Borrer), as the owner and property manager of Gateway Lakes, respectively.

{¶ 8} On September 5, 2017, the Ohio Power Company (AEP Ohio) filed a motion to intervene, pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11, noting that the Complainant alleges that NEP has unlawfully provided electric service to an electric load center within AEP Ohio's certified territory in violation of R.C. 4933.83(A).

{¶ 9} By entry issued September 11, 2017, the Complainant was directed to file an amended complaint within ten days against NEP and to include any other respondents as necessary under the factual circumstances regarding the resale of utility services at the Gateway Lakes Apartments, consistent with the COI Entry on Rehearing.

{¶ 10} On September 19, 2017, Ms. Wingo filed her Second Amended Complaint, adding GLA and Borrer as respondents, and on September 29, 2017, NEP filed an amended answer and amended motion to dismiss the complaint for lack of jurisdiction.

{¶ 11} On October 4, 2017, NEP filed a memorandum contra AEP Ohio's motion to intervene, arguing that AEP Ohio's certified territory rights are not in dispute as to Gateway Lakes, and asserting that AEP Ohio relinquished its right to serve Gateway Lakes years ago when it sold the infrastructure, installed a master meter and established GS-3 electric service at Gateway Lakes. Further, NEP notes that Ms. Wingo no longer lives at Gateway Lakes.

{¶ 12} On October 10, 2017, the Complainant filed a memorandum contra NEP's motion to dismiss the Second Amended Complaint, and AEP Ohio filed a reply memorandum in support of its intervention. In addition, Borrer filed an application for rehearing of the Attorney Examiner's September 11, 2017 Entry, requesting that the decision to grant Complainant leave to amend her complaint to add Borrer as a respondent be reversed.

{¶ 13} On October 20, 2017, the Complainant filed a memorandum contra Borrer's application for rehearing, and on October 24, 2017, NEP filed a reply in support of its amended motion to dismiss. On October 27, 2017, Borrer filed a reply to the Complainant's memorandum contra.

#### IV. NEP's AMENDED MOTION TO DISMISS

{¶ 14} In its Amended Answer to the Second Amended Complaint, NEP admits that Ms. Wingo previously rented an apartment at the Gateway Lakes, which are owned by GLA, and that NEP provides billing for electric, water, and sewer services under a contractual arrangement with GLA, including the billing of utility services to the Complainant on behalf of GLA (NEP Amended Answer at ¶1, 3, 12-13, 15-17, 57). NEP also admits that it sent Complainant a bill in January 2014 for \$650 after receiving Complainant's move-in information, that Complainant moved out of Gateway Lakes in June 2017, and that Complainant's final bill was \$4,106.98 (*Id.* at ¶59, 61). NEP also admits that it turned off electric service to Complainant's apartment (*Id.* at ¶63).

{¶ 15} NEP further admits that the charges for the services it provides to GLA were not disclosed in monthly bills rendered to the Complainant, or on NEP's website, and that none of the fees for the services it provides to GLA have been or are required to be reviewed or approved by the Commission (*Id.* at ¶21, 33, 42). In addition, NEP admits that NEP does not possess a certificate of public convenience and necessity to provide water or sewer service, or a certified territory authorizing or requiring it to provide electric service, and that NEP is not certified as a supplier of competitive retail electric service, and is not listed on the Commission's rolls of public utilities (*Id.* at ¶42-47). NEP does not deny the Complainant's allegation that Gateway Lakes residents are billed for electric generation service at AEP's standard service offer (SSO) rate, regardless of whether NEP has arranged to supply generation service through a CRES provider (Second Amended Complaint and *Id.* at ¶31).

{¶ 16} In its Amended Motion to Dismiss, NEP asserts that the Commission may decide this motion based on submitted evidence, and is not required to accept as true the allegations in the Complaint. NEP cites Ohio Adm.Code 4901-9-01(C), in noting that a respondent in a complaint proceeding may assert a lack of jurisdiction over the subject matter of the action, and NEP argues that the standard of review for the analogous provision in the Ohio Rules of Civil Procedure, Civ. R. 12(B)(1), is "whether any cause of action

cognizable by the forum has been raised in the complaint.” *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). NEP also cites *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526 (1976), for the proposition that the trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction pursuant to a Civ. R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment.

{¶ 17} NEP cites *In re Tobin Pledger v. Capital Properties Management, Ltd.*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004) as precedent for this Commission’s dismissal of a complaint for lack of subject matter jurisdiction, and NEP argues that, having clarified the applicability of the *Shroyer Test* to the reselling and redistribution of utility service in the COI Entry on Rehearing, the Commission may now apply the *Shroyer Test* in this proceeding to make the threshold jurisdictional determination and avoid the time and expense of a protracted hearing.

{¶ 18} NEP argues that the undisputed facts, when applied to the *Shroyer Test* are dispositive of this proceeding. NEP asserts that (1) it has not availed itself of the special benefits available to public utilities such as exercising the right of eminent domain; (2) that NEP’s services are not utility services, and are not available to the general public but are limited to multi-family property owners, managers and developers who contract with NEP; and (3) that NEP does not provide water, sewer, or electric services at Gateway Lakes. Moreover, NEP claims that even if deemed to be providing electric utility service, NEP qualifies for one of the two jurisdictional threshold safe harbors under the third prong of the *Shroyer Test* because the electric usage rates charged to Complainant did not exceed the public utility’s residential default rates on an annual basis.

{¶ 19} Along with its Amended Motion to Dismiss, NEP submitted the affidavit of John Calhoun, NEP’s Account Manager, and supporting documentation to show what the Complainant would have paid AEP Ohio under the applicable default residential service

tariff during her tenancy at Gateway Lakes for equivalent usage, compared to NEP's invoiced charges for her apartment usage. According to Mr. Calhoun's calculations, during Ms. Wingo's tenancy, NEP's invoiced charges were \$11.78 less than the AEP Ohio charges for the same period and usage under the then-current default service tariff on an annualized basis using the 12 months prior to her lease expiration (NEP Amended Motion to Dismiss, Calhoun Affidavit, ¶21-23).

{¶ 20} In her memorandum contra NEP's motion to dismiss, the Complainant does not dispute Mr. Calhoun's calculations, or any of the facts admitted by NEP. Instead, the Complainant cites *In re Dennewitz, et al, v. Dominion East Ohio*, Case No. 07-517-GA-CSS, Entry (Oct. 24, 2007) at 5, in arguing that R.C. 4905.26 does not permit summary judgments even if the facts are not disputed. She argues that the *Shroyer Test* cannot be resolved merely on the basis of an affidavit submitted by the submetering company in question. Rather, Ms. Wingo asserts, she is entitled to an opportunity for discovery and an evidentiary hearing. The Complainant also cites an attorney examiner's holding in *In re Ohio Consumers' Counsel v. Dominion Retail Inc.*, Case No. 09-257-GA-CSS, Entry (Jul. 1, 2009) ¶7 at 3, for the proposition that "when a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party" citing *In re XO Ohio, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on Rehearing (Jul. 1, 2003) ¶8 at 2. Further, the Complainant cites *Allnet Comm. Servs., Inc. v. Public Util. Comm.*, 32 Ohio St. 3d 115, 118 (1987), in arguing that the Commission is statutorily required under R.C. 4905.26 to set a complaint for hearing where reasonable grounds for the complaint are apparent and undisputed.

## V. DISCUSSION

{¶ 21} We need not address AEP Ohio's motion to intervene in this proceeding, before ruling on NEP's motion to dismiss this complaint, as the salient facts do not appear to be in dispute.

{¶ 22} The Commission's jurisdiction to hear complaints regarding the public utilities it regulates is defined by R.C. 4905.26, which states:

Upon complaint in writing against any public utility by any person \* \*  
\* that any \* \* \* service \* \* \* is in any respect unjust [or] unreasonable, \* \*  
\* or that any \* \* \* practice affecting or relating to any service furnished  
by the public utility, or in connection with such service, is, or will be, in  
any respect unreasonable, unjust, [or] insufficient, \* \* \* if it appears that  
reasonable grounds for complaint are stated, the commission shall fix a  
time for hearing and shall notify complainants and the public utility  
thereof. \* \* \*

{¶ 23} We agree that the Commission's procedural rules do not provide for summary judgment. Nonetheless, the statutory language makes clear that, in considering a complaint, the Commission must determine whether reasonable grounds to justify a hearing have been stated. "Broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony." *In re Consumers' Counsel v. The Dayton Power & Light Company*, Case No. 88-1085-EL-CSS, Entry (Sept. 27, 1988). Instead, "if the complaint is to meet the 'reasonable grounds' test, it must contain allegations, which, if true, would support the finding that the rates, practices, or services complained of are unreasonable or unlawful." To find otherwise and "permit a complaint to proceed to hearing when complainant has failed to allege one or more elements necessary to a finding of unreasonableness or unlawfulness would improperly alter both the scope and burden of proof." *In re Ohio Consumers' Counsel v. West Ohio Gas Co.*, Case No. 88-1743-GA-CSS, Entry (Jan. 31, 1989) at 3.

{¶ 24} Furthermore, the Complainant has the burden of proving her complaint, including that she suffered some injury, in this proceeding. *Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St.3d 509, 684 N.E.2d 43, 1997-Ohio-342, citing *Grossman v. Pub. Util. Comm.* (1966),

5 Ohio St.2d 189, 34 O.O.2d 347, 214 N.E.2d 666; *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1984), 14 Ohio St.3d 49, 50, 14 OBR 444, 445, 471 N.E.2d 475.

{¶ 25} We find that the Complainant has failed to meet her burden of proof in alleging reasonable grounds for hearing as required by R.C. 4905.26. The COI Entry on Rehearing clearly put the Complainant on notice that a Reseller of utility service to a submetered residential customer that charges more than what the customer would have paid for the local public utility's default service, would be deemed to be acting as a public utility under the third prong of the *Shroyer Test*, unless the Reseller could demonstrate that (1) it was simply passing through its annual costs of providing a utility service charged by a local public utility and competitive retail service provider (if applicable) to its submetered residents at a given premises; or (2) the Reseller's annual charges for a utility service to an individual submetered resident did not exceed what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs. *Commission's Investigation of Submetering*, Case No. 15-1594-AU-COI, Second Entry on Rehearing (Jun. 21, 2017) ¶40 at 15.

{¶ 26} In this case, the Complainant does not dispute the fact that during her tenancy, NEP's invoiced charges were less than what Ms. Wingo would have paid for the same period and usage under the default service tariff on an annualized basis. Thus, even accepting all material allegations of the complaint as true and construing such allegations in favor of the complaining party, the Commission finds that the resale of utility service to Ms. Wingo's apartment in the Gateway Lakes Apartments in Grove City, Ohio, falls within the safe harbor provisions of the *Shroyer Test*. Therefore, we find that reasonable grounds for complaint have not been stated, and that the motion to dismiss should be granted. Ms. Wingo asserts that she is entitled to an opportunity for discovery and an evidentiary hearing but does not identify any facts that, if proven at hearing, would change the outcome of our analysis under the safe harbor provisions of the *Shroyer Test* as set forth in the COI Entry on Rehearing. Accordingly, this complaint should be dismissed.

## VI. ORDER

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That this complaint be dismissed. It is, further,


{¶ 29} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

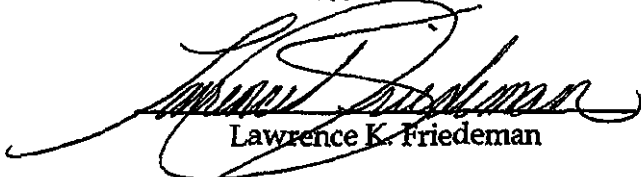
## THE PUBLIC UTILITIES COMMISSION OF OHIO


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Asim Z. Haque, Chairman

  
M. Beth Trombold

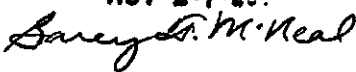
  
Thomas W. Johnson

  
Lawrence K. Friedeman

  
Daniel R. Conway

RMB/vrm

Entered in the Journal

NOV-24-2017  


Barcy F. McNeal  
Secretary



**ATTACHMENT B**

11

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
CYNTHIA WINGO,**

**COMPLAINANT,**

**v.**

**CASE NO. 16-2401-EL-CSS**

**NATIONWIDE ENERGY PARTNERS, LLC,  
ET AL.,**

**RESPONDENTS.**

**ENTRY ON REHEARING**

Entered in the Journal on January 17, 2018

**I. SUMMARY**

{¶ 1} The Commission grants the application for rehearing of the November 21, 2017 Finding and Order filed by the Ohio Power Company on December 21, 2017, for further consideration of the matters specified in the application for reharing, and finds that the Complainant's late-filed application must be dismissed.

**II. DISCUSSION**

{¶ 2} Pursuant to R.C. 4905.06, the Commission has general supervisory authority over all public utilities within its jurisdiction and may examine such public utilities and keep informed as to their general condition, to their properties, to the adequacy of their service, to the safety and security of the public and their employees, and to their compliance with all laws, orders of the Commission, franchises, and charter requirements. Pursuant to R.C. 4905.26, the Commission has authority to consider a written complaint against a public utility by any person or corporation regarding any rate, service, regulation, or practice affecting or relating to any service furnished by that public utility that is unreasonable, unjust, insufficient, or unjustly discriminatory or preferential. Further, the Commission may prescribe any rule or order that it finds necessary for protection of the public safety.

{¶ 3} On December 15, 2016, this complaint was filed on behalf of Cynthia Wingo (Complainant or Ms. Wingo) against Nationwide Energy Partners, LLC (NEP). According to her complaint, Ms. Wingo rented a residential apartment in the Gateway Lakes Apartments in Grove City, Ohio (Gateway Lakes), for which NEP supplies or arranges for the supply of electric, water, and sewer service to Gateway Lakes residents. The complaint further asserts that NEP is an "electric light company" under R.C. 4905.03(C), a "water-works company" under R.C. 4905.03(G), a "sewage disposal system company" under R.C. 4905.03(M), and a "public utility" under R.C. 4905.02. The complaint requests, inter alia, that the Commission find NEP to be a jurisdictional public utility, and order that NEP refund the difference between the rates charged Ms. Wingo by NEP and a lawful rate, as determined by the Commission, subject to treble damages under R.C. 4905.61. NEP filed an answer on January 5, 2017, denying that it provides jurisdictional public utility services.

{¶ 4} Ms. Wingo was subsequently granted leave to amend her complaint to add Gateway Lakes Acquisition LLC (GLA) and Borror Properties Management, LLC (Borror), as the owner and property manager of Gateway Lakes, respectively; and to address the Commission's recent decision regarding its jurisdiction over submetered arrangements in *In re the Commission's Investigation of Submetering*, Case No. 15-1594-AU-COI, Second Entry on Rehearing (Jun. 21, 2017) (COI Second EOR). On September 29, 2017, NEP filed an amended answer and amended motion to dismiss the complaint for lack of jurisdiction.

{¶ 5} On November 21, 2017, the Commission issued a Finding and Order granting NEP's motion to dismiss the complaint, finding that the Complainant had failed to meet her burden of proof in alleging reasonable grounds for hearing as required by R.C. 4905.26.

{¶ 6} Applications for rehearing of the Finding and Order were filed by the Ohio Power Company (AEP Ohio or Utility) and the Complainant on December 21 and 22, 2017, respectively.

{¶ 7} On January 2, 2018, NEP filed memoranda contra both applications for rehearing alleging, inter alia, that Ms. Wingo's application for rehearing was not timely filed in accordance with Ohio Adm.Code 4901-1-02(D)(4).

{¶ 8} On January 9, 2018, the Complainant filed a motion for leave to file a reply memorandum in support of her application for rehearing. In support of her motion, the Complainant cites Ohio Adm.Code 4901-1-31(A), which provides that the Commission may permit the filing of memoranda at any time during a proceeding, and Ohio Adm.Code 4901-1-12(B)(2), which provides that a party may file a reply memorandum within seven days after a memorandum contra, or such other period as the commission may direct. Further, the Complainant states that reply is limited to addressing the procedural issue raised by NEP's claim that the Complainant's application for rehearing was not timely filed, and that consideration of her reply will not unduly prejudice any party.

{¶ 9} In support of her motion, the Complainant admits that the docketed version of her application for rehearing shows that it was received by the Commission at 5:47 p.m. on December 21, 2017. She states that because her application was *actually received* by the Commission on the 30th day following the November 21, 2017 Opinion and Order, it is deemed "filed" as of December 21, 2017, in accordance with the judicially-recognized definitions of the terms "filed" and "day." Therefore, she concedes, her application was *constructively* filed one day late on December 22, 2017 under Ohio Adm.Code 4901-1-02(D)(4). However, she contends, the *actual* filing date is the date that matters under R.C. 4903.10. Consequently, she maintains that her application *was* timely filed and must be considered on its merits.

{¶ 10} Although Ohio Adm.Code 4901-1-35 does not provide for the filing of replies to memoranda contra opposing applications on rehearing, we will grant the Complainant's motion, pursuant to Ohio Adm.Code 4901-1-31(A), as the argument posed by Ms. Wingo appears to be one of first impression.

{¶ 11} The facts and applicable law here are not in dispute. R.C. 4903.10 and Ohio Adm.Code 4901-1-35 provide that any party who has entered an appearance in a Commission proceeding may apply for rehearing of a Commission order with respect to any matters determined therein by filing an application for rehearing within 30 days after the entry of the order upon the Commission's journal. R.C. 4901.10 requires the Commission's office to be open between eight-thirty a.m. and five-thirty p.m. throughout the year, Saturdays, Sundays, and legal holidays excepted. Accordingly, when the Commission adopted rules for e-filing, we constrained the Commission's e-filing system to abide by the traditional deadlines for paper filings to follow the statutory requirement set forth in R.C. 4901.10 and to create a level playing field for parties who may not have the resources to make e-filings. Therefore, Ohio Adm.Code 4901-1-02(D)(4) currently provides that any electronically-filed (e-filed) document received after five-thirty p.m. shall be considered filed on the next business day.

{¶ 12} The time stamp on the confirmation page of the Complainant's application for rehearing states that it was filed on December 21, 2017 at 5:47 p.m. and is, therefore, deemed filed on December 22, 2017, pursuant to Ohio Adm.Code 4901-1-02(D)(4). The Complainant here does not argue that she was prohibited from the timely filing of her application by a system failure, building closure, or some other technological impediment, for which the Commission has extended filing deadlines in the past.<sup>1</sup> Here, the Complainant argues that a strict statutory interpretation should be held to invalidate our current electronic e-filing rule.

{¶ 13} In addressing the Complainant's argument, we first note that the Supreme Court of Ohio has long held that time is of the essence with respect to the filing of an application for rehearing, and if such application is filed out of time, the Commission has no jurisdiction to entertain it. *City of Dover v. Pub. Util. Com.*, 126 Ohio St. 438, 449, 185 N.E.

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<sup>1</sup> See, e.g., *In re the extension of filing dates for pleadings and other papers due to a Building Emergency*, Case No. 14-38-AU-UNC Attorney Examiner Entries Jan. 8, and Mar. 3, 2014, and *In re Commission's Review of Ohio Adm.Code Chapter 4901:1-10*, Case No. 12-2050-EL-ORD, Attorney Examiner Entry Dec. 21, 2017.

833 (1933), Syllabus 1 and 2; *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 362, 16 O.O.2d 214, 176 N.E.2d 416 (1961). However, the question presented in the instant case is different from the issues raised in the above cited cases because a new method of filing is now available. Complainant's motion essentially challenges the Commission's authority to prescribe rules around the filing of documents in its systems.

{¶ 14} R.C. 4901.13 authorizes this Commission to adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. Pursuant to this authority, the Commission has, since 2005, developed procedures to accommodate e-filing in a series of rule-making cases in which the appropriate time for determining the official date of filing was raised and considered.<sup>2</sup> Most recently, this Commission considered the stakeholder arguments in retaining the 5:30 p.m. deadline for e-filings. *In re the Commission's Review of Ohio Adm.Code Chapter 4901:1-6*, Case No. 11-776-AU-ORD, Finding and Order (Jan. 22, 2014) at ¶¶13-14, 22, 40.

{¶ 15} With respect to the Complainant's argument in this case, however, we believe the Commission's establishment of the 5:30 p.m. e-filing deadline is reasonable, consistent with the statutory requirements set forth in R.C. 4901.10, and well within this Commission's authority under R.C. 4901.13. Accordingly, we find that the Complainant's application for rehearing was not timely filed pursuant to R.C. 4901.10, 4901.13, and Ohio Adm.Code 4901-1-02(D)(4), and the Commission has no jurisdiction to consider the Complainant's application for rehearing. Therefore, the Complainant's application for rehearing must be dismissed.

{¶ 16} With respect to its application for rehearing, AEP Ohio asserts that the Finding and Order unreasonably and unlawfully failed to grant the Utility's motion to intervene

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<sup>2</sup> See, e.g., *In re the Request of SBC Ohio for a Waiver of Procedural Rules to Permit Electronic Filing*, Case No. 05-548-AU-WVR, and *In re the Expansion of the Electronic Filing Pilot Project and Waiver of Procedural Rules Ohio Adm.Code 4901-1-02 through 4901-1-04*, Case No. 09-600-AU-WVR.

before dismissing the complaint, thereby denying AEP Ohio's right to be heard. Further, the Utility requests rehearing on the grounds that the Commission should have held this proceeding in abeyance until it ruled on the pending applications for rehearing of the COI Second EOR. Finally, AEP Ohio contends that the Commission's finding that reasonable grounds for the Complaint had not been stated is unreasonable and unlawful.

{¶ 17} The Commission grants AEP Ohio's application for rehearing as we find that sufficient reasons have been set forth to warrant further consideration of the matters specified therein.

### III. ORDER

{¶ 18} It is, therefore,

{¶ 19} ORDERED, That the application for rehearing filed by AEP Ohio be granted for further consideration of the matters specified therein. It is, further,

{¶ 20} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

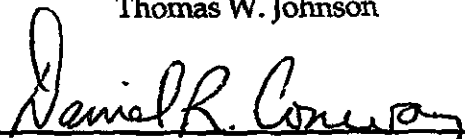
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Asim Z. Haque, Chairman

 M. Beth Trombold

  
Thomas W. Johnson

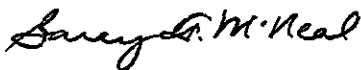
\_\_\_\_\_  
Lawrence K. Friedman

  
Daniel R. Conway

RMB/vrm/sc

Entered in the Journal

**JAN 17 2018**



Barcy F. McNeal  
Secretary



**ATTACHMENT C**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
CYNTHIA WINGO,**

**COMPLAINANT,**

**v.**

**CASE NO. 16-2401-EL-CSS**

**NATIONWIDE ENERGY PARTNERS, LLC,  
ET AL.,**

**RESPONDENTS.**

**SECOND ENTRY ON REHEARING**

Entered in the Journal on March 14, 2018

**I. SUMMARY**

{¶ 1} The Commission grants the Complainant's application for rehearing of the January 17, 2018 Entry on Rehearing for further consideration of the matters specified in the application for rehearing.

**II. PROCEDURAL HISTORY**

{¶ 2} Pursuant to R.C. 4905.06, the Commission has general supervisory authority over all public utilities within its jurisdiction and may examine such public utilities and keep informed as to their general condition, to their properties, to the adequacy of their service, to the safety and security of the public and their employees, and to their compliance with all laws, orders of the Commission, franchises, and charter requirements. Under R.C. 4905.26, the Commission has authority to consider a written complaint against a public utility by any person or corporation regarding any rate, service, regulation, or practice affecting or relating to any service furnished by that public utility that is unreasonable, unjust, insufficient, or unjustly discriminatory or preferential. Further, the Commission may prescribe any rule or order that it finds necessary for protection of the public safety.

{¶ 3} On December 15, 2016, this complaint was filed on behalf of Cynthia Wingo (Complainant or Ms. Wingo) against Nationwide Energy Partners, LLC (NEP). According

to her complaint, Ms. Wingo rented a residential apartment in the Gateway Lakes Apartments in Grove City, Ohio (Gateway Lakes), for which NEP supplies or arranges for the supply of electric, water, and sewer service to Gateway Lakes residents. The complaint further asserts that NEP is an "electric light company" under R.C. 4905.03(C), a "water-works company" under R.C. 4905.03(G), a "sewage disposal system company" under R.C. 4905.03(M), and a "public utility" under R.C. 4905.02. The complaint requests, inter alia, that the Commission find NEP to be a jurisdictional public utility, and order that NEP refund the difference between the rates charged Ms. Wingo by NEP and a lawful rate, as determined by the Commission, subject to treble damages under R.C. 4905.61. NEP filed an answer on January 5, 2017, denying that it provides jurisdictional public utility services.

{¶ 4} Ms. Wingo was subsequently granted leave to amend her complaint to add Gateway Lakes Acquisition LLC (GLA) and Borror Properties Management, LLC (Borror), as the owner and property manager of Gateway Lakes, respectively; and to address the Commission's recent decision regarding its jurisdiction over submetered arrangements in *In re the Commission's Investigation of Submetering*, Case No. 15-1594-AU-COI, Second Entry on Rehearing (Jun. 21, 2017) (COI EOR). On September 29, 2017, NEP filed an amended answer and amended motion to dismiss the complaint for lack of jurisdiction.

{¶ 5} On November 21, 2017, the Commission issued a Finding and Order (Nov. 21, 2017 Order) granting NEP's motion to dismiss the complaint, finding that the Complainant had failed to meet her burden of proof in alleging reasonable grounds for hearing as required by R.C. 4905.26.

{¶ 6} Applications for rehearing of the Nov. 21, 2017 Order were filed by the Ohio Power Company (AEP Ohio or Utility) and the Complainant on December 21 and 22, 2017, respectively.

{¶ 7} On January 2, 2018, NEP filed memoranda contra both applications for rehearing alleging, inter alia, that Ms. Wingo's application for rehearing was not timely filed in accordance with Ohio Adm.Code 4901-1-02(D)(4).

{¶ 8} On January 9, 2018, the Complainant filed a motion for leave to file a reply memorandum in support of her application for rehearing.

{¶ 9} On January 17, 2018, the Commission issued its Entry on Rehearing (1st EOR) granting further time to consider AEP Ohio's application for rehearing. The 1st EOR also granted Ms. Wingo's motion for leave to file a reply memorandum, but ultimately concluded that the Complainant's application for rehearing was not timely filed pursuant to R.C. 4901.10, 4901.13 and Ohio Adm.Code 4901-1-02(D)(4). Accordingly, the Commission found that it had no jurisdiction to consider Ms. Wingo's application for rehearing and it was, therefore, dismissed.

{¶ 10} On February 16, 2018, the Complainant filed an application for rehearing of the 1st EOR. NEP filed a memorandum contra on February 26, 2018.

### III. DISCUSSION

{¶ 11} R.C. 4903.10 and Ohio Adm.Code 4901-1-35 provide that any party who has entered an appearance in a Commission proceeding may apply for rehearing of a Commission order with respect to any matters determined therein by filing an application for rehearing within 30 days after the entry of the order upon the Commission's journal.

{¶ 12} In her application for rehearing of the 1st EOR, Ms. Wingo lists a single assignment of error: that the Commission violated R.C. 4903.10 by refusing to exercise jurisdiction to consider her application for rehearing of the Nov. 21, 2017 Order on the merits. In support of her claim, she notes that her application for rehearing of the Nov. 21, 2017 Order was filed on December 21, 2017 at 5:47 p.m., and that R.C. 4903.10 provides that an application for rehearing must be "filed" within thirty "days" of the underlying order. The Complainant cites *Bohacek v. Ohio Bur. of Emp. Services* (8th Dist. 1983), 9 Ohio App.3d

59, syllabus ¶2, 458 N.E.2d 408, in contending that a document is “filed” when it is “received” by the tribunal, and *Greulich v. Monnoin*, 142 Ohio St. 113, 117, 50 N.E.2d 310, 149 A.L.R. 477, 26 O.O. 314 (1943), for the proposition that “day” means a full calendar day: “Fractions of a day are not generally considered in the legal computation of time, and the day on which an act is done or an event occurs must be wholly included or excluded.”. She contends that, as the Commission’s official records show that her application for rehearing of the Nov. 21, 2017 Order was “received” on the thirtieth “day” following the issuance of that order, the Commission has jurisdiction to consider her application.

{¶ 13} In its memorandum contra, NEP contends that Ms. Wingo is essentially arguing that the Commission’s electronic filing (e-filing) deadline should be 11:59 p.m. rather than 5:30 p.m. NEP notes that Ohio Adm.Code 4901-1-02(D)(4) provides “that any e-filed document received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day.” NEP asserts that R.C. 4901.13 authorizes the Commission to adopt and publish rules to govern its proceedings, and that administrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law. *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 47, Syllabus ¶1, 554 N.E.2d 97 (1990).

{¶ 14} NEP further notes that when the Supreme Court of Ohio revised Rule 13 of the Rules of Appellate Procedure to allow for the adoption of e-filing systems, it required that local rules include provisions to specify the days and hours during which electronically transmitted documents will be received, and when such documents will be considered to have been filed. App.R.13(A)(2). NEP also notes the Court’s own rule, Supreme Court Rule of Practice 3.02(A)(3)(e), is virtually identical to the Commission’s in providing that “documents received after 5:00:00 p.m. local observed time in Columbus, Ohio through the E-Filing Portal shall not be considered for filing until the next business day.” Moreover, NEP cites *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 105 Ohio St.3d 1211, 2005-Ohio-1023, as an example where the Court has refused to accept appeals that failed to comply with the Court’s rules of practice.

{¶ 15} The procedural issue raised by the Complainant's e-filing of her application for rehearing of the Nov. 21, 2017 Order appears to be one of first impression. Accordingly, the Commission grants the Complainant's application for rehearing of the 1st EOR, as we find that sufficient reasons have been set forth to warrant further consideration of the matters specified therein.

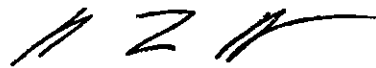
#### IV. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That the Complainant's application for rehearing of the 1st EOR be granted for further consideration of the matters specified therein. It is, further,

{¶ 18} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

#### THE PUBLIC UTILITIES COMMISSION OF OHIO



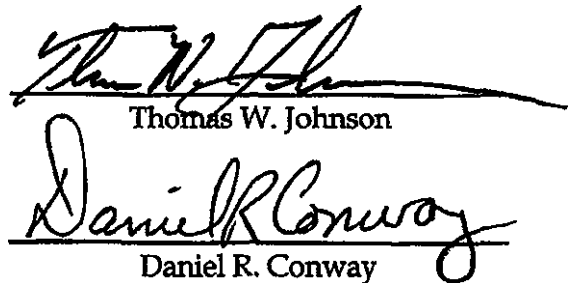
Asim Z. Haque, Chairman

M. Beth Trombold



Lawrence K. Friedeman

Thomas W. Johnson



Daniel R. Conway

RMB/mef

Entered in the Journal



MAR 14 2018

Barcy F. McNeal  
Secretary

**ATTACHMENT D**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
CYNTHIA WINGO,**

**COMPLAINANT,**

**v.**

**CASE NO. 16-2401-EL-CSS**

**NATIONWIDE ENERGY PARTNERS, LLC,  
ET AL.,**

**RESPONDENTS.**

**THIRD ENTRY ON REHEARING**

Entered in the Journal January 9, 2018

**I. SUMMARY**

{¶ 1} The Commission denies the Complainant's application for rehearing of the January 17, 2018 First Entry on Rehearing, and grants Ohio Power Company's application for rehearing of the November 21, 2017 Finding and Order, but only to the extent of allowing intervention.

**II. PROCEDURAL HISTORY**

{¶ 2} On December 15, 2016, this Complaint was filed on behalf of Cynthia Wingo (Complainant or Ms. Wingo) against Nationwide Energy Partners, LLC (NEP) regarding submetered electric, water, and sewer service to Ms. Wingo's residence at the Gateway Lakes Apartments in Grove City, Ohio (Gateway Lakes), for which NEP supplies or arranges for the supply of such services to Gateway Lakes residents. NEP filed an answer on January 5, 2017, denying that it provides jurisdictional public utility services.

{¶ 3} Ms. Wingo was subsequently granted leave to amend her Complaint to add Gateway Lakes Acquisition LLC (GLA) and Borror Properties Management, LLC (Borror), as the owner and property manager of Gateway Lakes, respectively; and to address the Commission's recent decision regarding its jurisdiction over submetered arrangements in *In re the Commission's Investigation of Submetering in the state of Ohio*, Case No. 15-1594-AU-COI (*Submetering Investigation*), Second Entry on Rehearing (Jun. 21, 2017) (*Jun. 21, 2017 COI*



*Entry*). On September 29, 2017, NEP filed an amended answer and amended motion to dismiss the complaint for lack of jurisdiction.

{¶ 4} On November 21, 2017, the Commission issued a Finding and Order in this case (Nov. 21, 2017 Order) finding that the Complainant had failed to state reasonable grounds for hearing as required by R.C. 4905.26, and granting NEP's motion to dismiss the Complaint.

{¶ 5} Applications for rehearing of the Nov. 21, 2017 Order were filed by the Ohio Power Company (AEP Ohio or Utility) on December 21, 2017, and by the Complainant on December 22, 2017.

{¶ 6} On January 2, 2018, NEP filed memoranda contra to the applications for rehearing of both AEP Ohio and the Complainant alleging, inter alia, that Ms. Wingo's application for rehearing was not timely filed in accordance with Ohio Adm.Code 4901-1-02(D)(4).

{¶ 7} On January 9, 2018, the Complainant filed a motion for leave to file a reply memorandum in support of her application for rehearing.

{¶ 8} On January 17, 2018, the Commission issued an Entry on Rehearing granting further time to consider AEP Ohio's application for rehearing. The Jan. 17, 2018 Entry also granted Ms. Wingo's motion for leave to file a reply memorandum, but ultimately concluded that the Complainant's application for rehearing was not timely filed pursuant to R.C. 4901.10, 4901.13 and Ohio Adm.Code 4901-1-02(D)(4). Accordingly, the Commission found that it had no jurisdiction to consider Ms. Wingo's application for rehearing and it was, therefore, dismissed. Jan. 17, 2018 Entry at ¶¶ 1, 10-15.

{¶ 9} On February 16, 2018, the Complainant filed an application for rehearing of the Jan. 17, 2018 Entry; and NEP filed a memorandum contra on February 26, 2018.

{¶ 10} On March 14, 2018, the Commission issued a Second Entry on Rehearing granting further time to consider Complainant's request for rehearing of the Jan. 17, 2018 Entry.

### III. DISCUSSION

{¶ 11} R.C. 4903.10 and Ohio Adm.Code 4901-1-35 provide that any party who has entered an appearance in a Commission proceeding may apply for rehearing of a Commission order with respect to any matters determined therein by filing an application for rehearing within 30 days after the entry of the order upon the Commission's journal.

**A. *The Complainant's Application for Rehearing of the Nov. 21, 2017 Order was not timely filed.***

{¶ 12} The Complainant's application for rehearing of the Jan. 17, 2018 Entry, lists a single assignment of error: that the Commission violated R.C. 4903.10 by refusing to exercise jurisdiction to consider her application for rehearing of the Nov. 21, 2017 Order on its merits. In support of this argument, the Complainant admits that her application for rehearing of the Nov. 21, 2017 Order was filed on December 21, 2017 at 5:47 p.m., and that R.C. 4903.10 provides that an application for rehearing must be "filed" within 30 "days" of the underlying order. The Complainant cites *Bohacek v. Ohio Bur. of Emp. Services* (8th Dist. 1983), 9 Ohio App.3d 59, syllabus ¶2, 458 N.E.2d 408, in contending that a document is "filed" when it is "received" by the tribunal. The Complainant also asserts that "day" means a full calendar day: "Fractions of a day are not generally considered in the legal computation of time, and the day on which an act is done or an event occurs must be wholly included or excluded." *Greulich v. Monnoin*, 142 Ohio St. 113, 117, 50 N.E.2d 310, 149 A.L.R. 477, 26 O.O. 314 (1943). The Complainant contends that, as the Commission's official records show that her application for rehearing of the Nov. 21, 2017 Order was actually "received" on the thirtieth "day" following the issuance of that order, the Commission has jurisdiction to consider her application.

{¶ 13} The Complainant contends that the Jan. 17, 2018 Entry's statutory interpretations are unreasonable and unlawful, and reached an arbitrary result, because the only issue was whether the filing was actually received by the Commission on December 21, 2017. The Complainant argues that R.C. 4901.10 requires the Commission to be open from 8:30 a.m. to 5:30 p.m., but says nothing about how or when the Commission must accept filings. The Complainant notes that Ohio Adm.Code 4901-1-02(A)(3) requires the Docketing Division to be open from 7:30 a.m. to 5:30 p.m., Monday through Friday, and asserts that if R.C. 4901.10 requires the Commission to only accept filings between 8:30 a.m. and 5:30 p.m., then every filing ever accepted between 7:30 a.m. and 8:29 a.m. is unlawful and invalid. The Complainant reasons that if the Commission has authority to accept filings before 8:30 a.m., then it also has authority to accept filings after 5:30 p.m.

{¶ 14} The Complainant also contends that R.C. 4903.10 is a "remedial" law, which shall be liberally construed in order to promote its object and assist the parties in obtaining justice, pursuant to R.C. 1.11. The Complainant criticizes the Jan. 17, 2018 Entry for strictly applying Ohio Adm.Code 4901-1-02(D)(4), rather than broadly construing the statutory terms "file" and "day." The Complainant maintains that the constructive date of filing is not controlling under R.C. 4903.10; rather it is the date the filing was actually received by the Commission, which was December 21, 2017.

{¶ 15} Finally, the Complainant observes that the deadline for filing an application for rehearing is a statutory, jurisdictional deadline, unlike any other deadline that parties must typically observe in Commission proceedings where the Commission may grant waivers of its own rules. The Complainant suggests that the Commission could extend the filing deadline to 11:59 p.m. for just such filings with a statutory deadline. This would bring the Commission's rules closer to those adopted in the Franklin County Ohio Court of

Common Pleas and the U.S. Southern District of Ohio, where all filings are permitted up until midnight of the due date.<sup>1</sup>

{¶ 16} In its memorandum contra, NEP counters that the Complainant is essentially arguing that the Commission's electronic filing (e-filing) deadline should be 11:59 p.m. rather than 5:30 p.m. NEP notes that Ohio Adm.Code 4901-1-02(D)(4) provides "that any e-filed document received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day." NEP argues that R.C. 4901.13 authorizes the Commission to adopt and publish rules to govern its proceedings, and that administrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law. *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 47, Syllabus ¶1, 554 N.E.2d 97 (1990).

{¶ 17} NEP further notes that when the Supreme Court of Ohio revised Rule 13 of the Ohio Rules of Appellate Procedure to allow for the adoption of e-filing systems, it required that local rules include provisions to specify the days and hours during which electronically transmitted documents will be received, and when such documents will be considered to have been filed. App.R.13(A)(2). NEP also notes that the Court's own rule, S.Ct.Prac.R. 3.02(A)(3)(e), is virtually identical to the Commission's in providing that "documents received after 5:00:00 p.m. local observed time in Columbus, Ohio through the E-Filing Portal shall not be considered for filing until the next business day." Moreover, NEP cites *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 105 Ohio St.3d 1211, 2005-Ohio-1023, as an example of where the Court has refused to accept an appeal that failed to comply with the Court's rules of practice.

{¶ 18} NEP also argues that Ohio courts have held that filing can only occur if a pleading is actually delivered and accepted by the correct officer during normal business hours, citing *Piper v. Burden*, 16 Ohio App.3d 361, 362 (3d. Dist. 1984) ("[O]nly a notice of appeal left at the office of the clerk of courts with the clerk, himself, or with his deputy while

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<sup>1</sup> See, Franklin County Ohio Court of Common Pleas, Sixth Amended Admin. Order, at 9; and Southern District of Ohio Policies and Procedures, Electronic Case Filing Procedures Guide (Jan. 2016) at 1.

the office is open for business, is required to be filed by the clerk.”); *King v. Paylor*, 69 Ohio App. 193, 43 N.E.2d 313 (1st. Dist. 1942) (rejecting the filing of a notice of appeal as timely when the appellant delivered the notice to the clerk of courts outside of the clerk’s normal business hours and left the notice on the clerk’s desk); *Id.* at 196 (“[A] filing can only be accomplished by bringing the paper to the notice of the officer, so that it can be accepted by him as official custodian.”); *Karwan v. Schmidt*, 8th Dist. Cuyahoga No. 36465, 1977 Ohio App. LEXIS 7795, 1977 WL 201565 (Sep. 29, 1977) (pleading not filed when it was left on the clerk’s desk who was extremely busy at the time). NEP asserts that merely transmitting the document to the clerk’s office, whether by leaving it on an empty chair after hours, or e-filing it after-hours and outside the Commission’s same-day filing window, is not enough; the document must be timely transmitted *and accepted* for filing in accordance with the Commission’s rules in order to constitute a valid filing. NEP also cites two 8th District Court of Appeals decisions where the court has distinguished between a party’s electronic submission of a document, and the Clerk’s acceptance of that filing, in holding that e-filings rejected by the clerk for technical deficiencies were untimely. *Culler v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 101386, 2014-Ohio-5434; and *Rutti v. Dobeck*, 8th Dist. Cuyahoga No. 105634, 2017 WL 5903455, 2017-Ohio-8737.

{¶ 19} We first note the relevant statutes and several rules necessary for review in our decision. R.C. 4903.10 provides that applications for rehearing “shall be filed within thirty days after the entry of the order upon the journal of the commission.” The General Assembly has also established the hours of the Commission, in R.C. 4901.10, stating that the Commission offices “shall be open between eight-thirty a.m. and five-thirty p.m. throughout the year, Saturdays, Sundays, and legal holidays excepted.” In Ohio Adm.Code 4901-1-02(A)(3), the Commission has determined the docketing division will be open earlier (seven-thirty a.m.) than what is required by statute.

{¶ 20} Ohio Adm.Code 4901-1-02, entitled “Filing of pleadings and other documents,” sets forth the Commission rules for filing documents with the Commission’s Docketing Division, whether it be via paper filing, facsimile transmission (fax), or e-filing.

Subsection (D) of this rule contains the specific e-filing provisions which require that all filings comply with the posted e-filing manual and technical requirements (covering such details as virus detection, and acceptable electronic file sizes and formats). Ohio Adm.Code 4901-1-02(D)(4) provides that an e-filed document will be considered filed as of the date and time recorded on the confirmation page that is electronically inserted as the last page of the filing upon receipt by the Commission, except that any e-filed document received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day. Further, the rule provides that the Commission's Docketing Division may reject any filing that does not comply with the electronic filing manual and technical requirements, is unreadable, includes anything deemed inappropriate for inclusion on the Commission's web site, or is submitted for filing in a closed or archived case. The Commission specifically has provided guidance regarding timing and acceptance in Ohio Adm.Code 4901-1-02(D)(7), noting that a person making an e-filing bears the risk of transmission or other failure. More importantly, subparagraph (D)(6) of the rule specifically states that: "The commission's docketing division closes at five-thirty p.m. To allow time for same-day review and acceptance of e-filings, persons making e-filings are encouraged to make their filings by no later than four p.m."

{¶ 21} The Commission denies Complainant's second rehearing application, and affirms our findings previously stated in the Jan. 17, 2018 Entry. The Complaint's original application for rehearing must be dismissed as it was not timely filed pursuant to R.C. 4903.10 and Ohio Adm.Code 4901-1-02(D)(4). As noted above, the Commission's 5:30 e-filing deadline under Ohio Adm.Code 4901-1-02(D)(4) is consistent with the Court's own rule, S.Ct.Prac.R. 3.02(A)(3)(e), in delaying acceptance of after-hours e-filings until the next business day. The time stamp on the confirmation page of the Complainant's original application for rehearing states that it was filed on December 21, 2017 at 5:47 p.m. Therefore, pursuant to Ohio Adm.Code 4901-1-02(D)(4), an e-filed document will be considered filed as of the date and time recorded on the confirmation page that is electronically inserted as the last page of the filing upon receipt by the Commission, except that any e-filed document

received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day. Accordingly, the Complainant's original rehearing application is considered filed on December 22, 2107, which makes it an untimely application under R.C. 4903.10.

{¶ 22} Further, the Complainant's late e-filing in this case is similar to those cases cited by NEP where the paper filing was not actually delivered and accepted by the correct officer during normal business hours. See, *Piper*, 16 Ohio App.3d 361, 362 (3d. Dist. 1984), and *King*, 69 Ohio App. 193, 43 N.E.2d 313 (1st. Dist. 1942). The Commission's rules provide for the filing and acceptance of documents, whether paper filed or electronically filed, during business hours for the Docketing Division. These analogous cases cited by NEP involve paper filings received by the clerk of courts outside of business hours, and support the Commission's conclusions regarding e-filing in this case.

{¶ 23} We do not believe that the Jan. 17, 2018 Entry conflicts with *Greulich*, 142 Ohio St. 113, 50 N.E.2d 310, 149 A.L.R. 477, 260.0.314 (1943) as the Complainant asserts, as that case is about the calculation of time to determine the termination date of an insurance policy pursuant to the terms of the contract. In support of rehearing, the Complainant relies on the Court in *Greulich* noting the general rule summarized in 39 Ohio Jurisprudence, 196, Section 10, under the subject of computation of time: "Fractions of a day are not generally considered in the legal computation of time, and the day on which an act is done or an event occurs must be wholly included or excluded. 'The term 'day,' in law, embraces the entire day..." *Greulich*, at 113, 117. However, the proposition of law cited in *Greulich*, relating to the definition of "the term day" under an insurance policy, is inapplicable to the issue before the Commission where we are interpreting a clear statute and rule regarding filing and acceptance of documents. The Court in *Greulich* viewed the insurance policy in terms of contract law, noting that "We believe that it is a matter of common knowledge as well as a principle of law that a contract which, by its terms, expires on a certain day, remains in force for the whole of that day unless by its express wording it is limited to a certain time of the day upon which it expires. In the absence of an express limitation, the law does not take

notice of a fraction of a day.” *Greulich* at 118, citing to *Garelick v. Rosen*, 274 N.Y. 64, 8 N.E.2d 279, 280.

{¶ 24} The Court’s interpretation of an insurance policy in *Greulich* does not require the Commission to be available to accept filings 24 hours each day. Ohio Adm.Code 4901-1-02(D)(4) clearly requires that a document be filed by 5:30 p.m., in order to be timely filed. The Complainant maintains that the actual date that her document was uploaded to the Commission’s system, December 21, 2017, is controlling under R.C. 4903.10. The Complainant’s argument is simply wrong.

{¶ 25} Moreover, our holding in the Jan. 17, 2018 Entry is not in conflict with *Bohacek*, 9 Ohio App.3d 59, a decision cited by the Complainant for the proposition that a document is “filed” when it is “received” by the tribunal. *Bohacek* involved an appeal of an Unemployment Compensation Board of Review decision in which the Court stated that “[t]he only reasonable interpretation of the words ‘filing’ and ‘filed’ [of a paper document] is ‘actual delivery into official custody or files’ and not (as appellant would argue) ‘deposit into the mails’ (for receipt at some unknown future date).” *Bohacek* at 413. In that case, the 8th District Court of Appeals concluded that the appellant had failed to file a notice of appeal with the board within the 30-day time limit specified in R.C. 4141.28(O), where the appellant had filed her notice of appeal in the court of common pleas and mailed a copy to the board prior to the deadline, but the notice was not received by the board until the day after the deadline. Our decision, in fact, is consistent with *Bohacek* as the e-filed rehearing application was not received and accepted by the Commission until the following business day, as it was filed after 5:30 p.m. Just because an electronic file is uploaded to the Commission’s docketing system, such e-filed document is not automatically accepted as “filed.” The uploaded file must be readable and comply with all technical requirements, as well as be accepted by the Commission’s Docketing Division in accordance with Ohio Adm.Code 4901-1-02(D)(4).



{¶ 26} Further, nothing requires that the Commission's internet filing system be available for the full 24-hour calendar day. As discussed in the Jan. 17, 2018 Entry at ¶11, the Commission's e-filing rules were adopted to create a level playing field for all parties by reflecting the paper filing constraint under Ohio Adm.Code 4901-1-02(D)(4), which allows paper filings to be made at the Commission's Docketing Division between 7:30 a.m. and 5:30 p.m., Saturdays, Sundays, and legal holidays excepted. The adoption of a midnight e-filing deadline would create an unfair disadvantage for paper filing parties, and would require additional staffing resources to accept e-filings after 5:30 p.m.<sup>2</sup> With respect to Complainant's argument, a paper filing could be delivered to the Commission's offices after 5:30 p.m., but such delivery does not mean that the document would be required to be accepted as properly filed with the Commission's Docketing Division. Paper filings must be delivered by post, messenger, or in person to the Docketing Division's filing window by 5:30 p.m. on the business day on which they are due, pursuant to Ohio Adm.Code 4901-1-02.

{¶ 27} Further, the Commission must anticipate both planned and unplanned after-hours outages of the Commission's e-filing system, for which we are not staffed to remedy or even provide notice. Ohio Adm.Code 4901-1-02(D)(6) expressly encourages parties to e-file by 4:00 p.m., so as to allow for same-day review and acceptance of e-filings, and to provides parties with time to make paper or fax filings in the event of an unplanned outage of the e-filing system.

{¶ 28} The Complainant's arguments on rehearing have been considered by the Commission and are rejected. Any arguments in support of the Complainant's assignment of error not specifically discussed herein have been thoroughly and adequately considered

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<sup>2</sup> See, *In re Amendment of Ohio Adm.Code Chapters 4901-1, et al.*, Case No. 11-776-AU-ORD, Finding and Order (Jan. 22, 2014) at 8-12, discussing the electronic filing provisions of Ohio Adm.Code 4901-1-02(D)(4).

by the Commission and are hereby denied. Accordingly, the Complainant's application for rehearing of the Jan. 17, 2018 Entry is denied.

**B. AEP Ohio's Application for Rehearing of the Nov. 21, 2017 Order**

{¶ 29} In its application for rehearing, AEP Ohio lists three assignments of error. It first asserts that the Nov. 21, 2017 Order unreasonably and unlawfully failed to grant the Utility's motion to intervene before dismissing the complaint, thereby denying AEP Ohio's right to be heard.

{¶ 30} R.C. 4903.221 provides that any person who may be adversely affected by a Commission proceeding may intervene in such proceeding, while R.C. 4903.221(B) and Ohio Adm.Code 4901-1-11 list four criteria for the Commission to consider in ruling upon a motion 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 the full development and equitable resolution of the factual issues.

**1. AEP OHIO'S INTERVENTION**

{¶ 31} AEP Ohio has a real and direct interest in this proceeding because it has the exclusive right to provide electric service to the Gateway Lakes owner as the property is located within AEP Ohio's service territory. Additionally, AEP Ohio's intervention will not unduly prolong or delay these proceedings, and its participation contributes to the full development and equitable resolution of the factual issues considered herein. In this case, AEP Ohio has an obligation to serve the Reseller within its service territory and its

intervention meets each of the four statutory criteria set forth above. Accordingly, AEP Ohio's first ground for rehearing and its motion to intervene will be granted.

## 2. NO GROUNDS FOR DELAY

{¶ 32} As its second ground for rehearing, AEP Ohio contends that the Commission should have held this proceeding in abeyance until it ruled on the pending applications for rehearing in the *Submetering Investigation* case.

{¶ 33} We disagree. In its application for rehearing, the Utility admits that this Commission has the inherent authority to control its own dockets and determine which issues will be heard in which docket. AEP Ohio also notes that the Commission exercised such authority in deferring the adjudication of the complaint in *re Whitt v. Nationwide Energy Partners, LLC*, Case No. 15-697-EL-CSS, pending the outcome of the broader *Submetering Investigation*. *Whitt*, Entry (Nov. 18, 2015) at 6-7. The Utility goes so far as to suggest that the Commission vacate the Nov. 21, 2017 Order until such time as the *Submetering Investigation* is concluded and reviewed by the Ohio Supreme Court (AEP Ohio application for rehearing at 5-6, 8).

{¶ 34} In the *Whitt* case, we deferred consideration of the merits of that complaint to allow for comments from non-party stakeholders in the *Submetering Investigation* docket. Those comments have now been considered, and we have found that the *Shroyer Test*, first established in *In re Inscho, et al. v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) at 2, 4-6, as modified by the Relative Price Test and Safe Harbors, provide appropriate tools in analyzing whether the Commission should assert jurisdiction over residential submetered arrangements based upon the facts in a particular case. *Jun. 21, 2017 COI Entry* at ¶¶ 22, 31.

{¶ 35} In the *Jun. 21, 2017 COI Entry*, we said that any complaint regarding residential submetered electric, natural gas, water or sewer services should be analyzed on a case-by-case basis under the *Shroyer Test* to determine if the submetered arrangement is subject to

Commission jurisdiction; and we added the Relative Price Test to our analysis under the third prong of that test to create a rebuttable presumption that the provision of such services is not ancillary the Reseller's primary business where the charges exceed what the resident would have paid for direct service from the applicable regulated utility. The *Jun. 21, 2017 COI Entry* also announced two Safe Harbors that would allow the Reseller to rebut the presumption: (1) where the Reseller is simply passing through its annual costs of providing a utility service charged by the public utility (and generation charges from a CRES provider, if applicable) to submetered residents at a given premises; or (2) where the Reseller's annual charges for a utility service to an individual submetered resident do not exceed what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs. *Jun. 21, 2017 COI Entry* at ¶¶ 40, 49-50.

¶¶ 36 We find no benefit or basis for granting an indefinite delay in considering the specific arrangements in this case. The Nov. 21, 2017 Order in this case is consistent with our recent order in the Complainant's related case, *In re Wingo v. Nationwide Energy Partners, LLC*, Case No. 17-2002-EL-CSS, Finding and Order (Oct. 24, 2018) at ¶¶ 70-71, in applying the guidance developed in the *Jun. 21, 2017 COI Entry* to the specific facts in this case. Nov. 21, 2017 Order at ¶¶ 25-26. We again affirm our use of the Relative Price Test and Safe Harbor analysis in this case in determining that the provision of residential submetered electric service to the Complainant's Gateway Lakes apartment should not be subject to our jurisdiction. Accordingly, AEP Ohio's second ground for rehearing will be denied.

### 3. REASONABLE GROUNDS FOR THE COMPLAINT HAVE NOT BEEN STATED

¶¶ 37 Finally, AEP Ohio contends that the Nov. 21, 2017 Order is unreasonable and unlawful in concluding that reasonable grounds for the Complaint have not been stated. The Utility argues that the Nov. 21, 2017 Order is unlawful and unreasonable because the two Safe Harbor provisions are unlawful and unreasonable when applied to for-profit submetering entities, like NEP. AEP Ohio asserts that third prong of the *Shroyer Test* is appropriate where the entity being tested has some business relationship with the end use

consumer beyond the provision of utility service, but is meaningless when it is applied to an entity, like NEP, whose sole business is the provision of utility service. AEP Ohio also seeks to incorporate its July 21, 2017 application for rehearing in the *Submetering Investigation*, in arguing that the appropriate test to use in determining if a submetering entity is a public utility should be whether the entity marks up master metering service and makes any profit from submetering (AEP Ohio application for rehearing at 8-10).

{¶ 38} AEP Ohio's "no markup" approach in analyzing jurisdictional submetering arrangements was considered and rejected in the *Jun. 21, 2017 COI Entry* at ¶¶ 36, 45. That approach ignores established precedent that it is the landlord, not the tenant, who is the utility's customer. *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 32-39; *Jonas v. Swetland Co.*, 119 Ohio St. 12, 162 N.E. 45 (1928); *Shopping Ctrs. Assn. v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 32 O.O.2d 1, 208 N.E.2d 923 (1965), and *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶9. The Relative Price Test and Safe Harbor exceptions under the third prong of the *Shroyer* Test, as adopted and applied in the Nov. 21, 2017 Order in this case, are consistent with established precedent, and are justified in those submetered arrangements where the landlord is merely passing along its costs of providing service, or where the resident has not been harmed by paying more, on an annualized basis, than if directly served by the applicable public utility.

{¶ 39} The Nov. 21, 2017 Order in this case correctly applied all three parts of the *Shroyer* Test, including the Relative Price Test and Safe Harbors, given the record here. The Complainant has failed to produce any evidence which would dispute NEP's statements that it doesn't hold any certificates of authority from this Commission or receive any of the special benefits available to public utilities. Further, the Complainant has failed to refute credible statements that the provision of utility services at Gateway Lakes, including those services provided by NEP, are limited to the Gateway Lakes apartments, and do not extend to the general public. The Complainant also does not dispute the calculation by NEP's Account Manager that during Ms. Wingo's tenancy, NEP's invoiced charges were \$11.78

less than the AEP Ohio charges for the same period and usage under the then-current default service tariff on an annualized basis using the 12 months prior to her lease expiration. Nov. 21, 2017 Order at ¶¶ 18-20, 26.

{¶ 40} Based on this analysis, the Nov. 21, 2017 Order correctly concluded that the Complainant failed to meet her burden in alleging reasonable grounds for hearing as required by R.C. 4905.26. As noted there, the Complainant has the burden of alleging that she suffered some injury in this proceeding. *Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St.3d 509, 684 N.E.2d 43, 1997-Ohio-342, citing *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189, 34 O.O.2d 347, 214 N.E.2d 666; *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1984), 14 Ohio St.3d 49, 50, 14 OBR 444, 445, 471 N.E.2d 475. Nov. 21, 2017 Order at ¶¶ 24-26. Accordingly, AEP Ohio's third ground for rehearing will be denied.

#### IV. ORDER

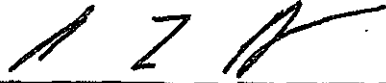
{¶ 41} It is, therefore,

{¶ 42} ORDERED, That the Complainant's application for rehearing of the Jan. 17, 2018 Entry be denied. It is, further,

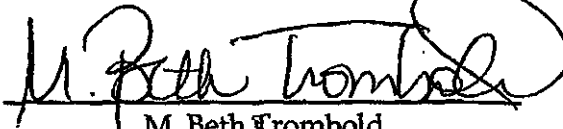
{¶ 43} ORDERED, That AEP Ohio's motion to intervene and application for rehearing of the Nov. 21, 2017 Order be granted as to such intervention, but denied in all other respects. It is, further,

{¶ 44} ORDERED, That a copy of this Third Entry on Rehearing be served upon all parties of record.

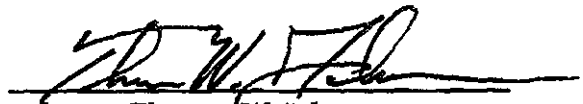
THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman



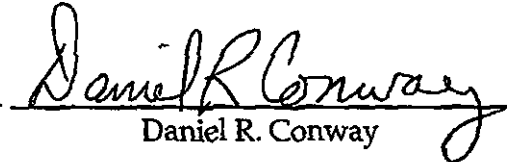
M. Beth Frombold



Thomas W. Johnson



Lawrence K. Friedeman



Daniel R. Conway

RMB/mef

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Tanowa M. Troupe  
Secretary