BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Ohio Power Company,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 21-990-EL-CSS
	)	
Nationwide Energy Partners, LLC	)	
	)	
Respondent.	)	

OHIO POWER COMPANY'S REVISED[1] INTERLOCUTORY APPEAL (OR, IN THE ALTERNATIVE, REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL) OF THE ATTORNEY EXAMINER'S DECEMBER 28, 2021 ENTRY GRANTING PRELIMINARY RELIEF TO NATIONWIDE ENERGY PARTNERS, INC.

Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-15, Complainant Ohio Power Company ("AEP Ohio") brings this interlocutory appeal of the December 28, 2021 Entry ("Entry") granting the self-styled motion for a "stay" of Respondent Nationwide Energy Partners, LLC ("NEP"). This Entry, attached hereto, had the effect of ordering AEP Ohio to abandon service to over 1,000 customers (the "Apartment Complex Customers," *see* Compl. ¶ 8) and immediately begin the construction process to convert five multifamily buildings to submetering (the "Apartment Complexes," *see id.*). AEP Ohio is complying with the Entry's directives during the pendency of this interlocutory appeal, but urges the Commission to overturn the Entry as soon as possible.[2]

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[1] This Revised filing merely corrects the sequence of pages in the Attached PDF of the Entry, because the original filing had odd pages then even pages due to a scanning error.

[2] Notwithstanding its legal positions set forth below, AEP Ohio is thus responding to the Attorney Examiner's ruling in a cooperative and orderly manner – based on the presumptions that the Commission will address the jurisdictional matter in a timely manner and that it will establish a reasonable process to resolve the underlying substantive issues emanating from the Supreme Court's 2020 remand order (*i.e.*, establish an evidentiary hearing and related procedural schedule to consider the merits of the complaint). The Company, however, explicitly reserves the right

As discussed below, the Entry did not grant a "stay," but rather granted preliminary, substantive relief to NEP. As a result, the Entry exceeded the limited jurisdiction to decide "procedural matters" under O.A.C. 4909-1-14. The Entry also raised novel and important interpretations of law. For instance, the Entry incorrectly assumed, without any reasoning, that the Commission is empowered to grant preliminary relief in a complaint case under R.C. 4905.26 (it is not). The Entry also adopted a novel and erroneous standard for preliminary relief, granting such relief where the movant's likelihood of success on the merits was merely "nebulous," and where the movant had put forward only "representations" that it "may" be harmed. Entry at 13-14. In so ruling, the Entry contravened clearly established case law holding that a party seeking preliminary relief "has a substantial burden to meet" and must establish its entitlement to preliminary relief "by showing *clear and convincing evidence* of each element of the claim." *E.g.*, *Newburgh Hts. v. State*, 2021-Ohio-61, ¶ 12 (emphasis added) (quoting *KLN Logistics Corp. v. Norton*, 2008-Ohio-212, ¶ 11 (8th Dist.)).

For these reasons, and as more fully discussed below, the Commission should hear this interlocutory appeal as of right under O.A.C. 4901-1-15(A), or in the alternative an interlocutory appeal should be certified to the Commission under O.A.C. 4901-1-15(B). The Commission should reverse the Entry and should deny NEP's motion for a "stay."

I. An interlocutory appeal should be granted.

A. An interlocutory appeal should be granted as of right because the Attorney Examiner lacked authority to grant preliminary, substantive relief.

The Entry did not cite any authority under which an Attorney Examiner – as opposed to the Commission – may grant the relief requested by NEP. By statute, Attorney Examiners are

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to pursue any legal remedy it deems necessary in the future, including but not limited to an appeal or an extraordinary writ before the Supreme Court of Ohio.

authorized to perform certain enumerated evidence-gathering tasks, as well as "such other duties as are prescribed by the Commission." R.C. 4901.18. Implementing that statute, the Commission has empowered Attorney Examiners to rule on "any procedural motion or other procedural matter." O.A.C. 4901-1-14. No statute or Commission regulation authorizes Attorney Examiners to grant any form of substantive relief. Although in some cases Attorney Examiners may propose "findings and recommendations" to the Commission on substantive matters, these are "advisory only." R.C. 4901.18.

Here, the relief that NEP requested was not "procedural," and it was not a "stay." A stay is the "postponement or halting of a *proceeding, judgment*, or the like." Black's Law Dictionary (11th ed. 2019, entry for "stay") (emphasis added). A stay of a proceeding is an order that suspends a procedural schedule pending some event, such as a stay of filing deadlines in a case referred to mediation, *see* Sup. Ct. R. Prac. 19(2). A stay of a judgment is an order that suspends the effect of a tribunal's decision pending some event, such as a stay of judgment pending appeal, *see* Ohio R. of App. P. 7. [3] Here, NEP obviously did not request a stay of a

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[3] Commission precedent cited by the Entry accords with this definition where cases addressed requests for stays of Commission orders approving rates or charges (i.e., the "postponement or halting . . . of a judgment"). *See In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (Feb. 20, 2003) (addressing a requested stay of the effect of a Commission order pending rehearing and appeal); *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Entry (Mar. 30, 2009) (addressing a requested stay of a Commission order setting new rates).

One decision, *In re Complaint of Northeast Ohio Public Energy v. Ohio Edison Company, et al.*, Case No. 09-423-EL-CSS, Entry (July 8, 2009), did appear to conflate the concepts of a stay and preliminary relief, but this distinction was not raised by the parties, and the Commission's "stay" ruling was, in substance, a final ruling on the merits, not a "stay." In that proceeding, the Commission had just enacted a new regulation prohibiting "switching fees" assessed to customers who switch to or from a government aggregation. The complainant brought the case requesting that the Commission require the respondent utilities to remove such switching fees from their tariffs. The Commission effectively decided the merits of the case by granting a "stay" of the effect of the Respondents' tariffs, since no hearing or final adjudication ever occurred. It is unlikely that the Commission would have taken this approach if the respondents had raised the distinction between a "stay" and preliminary injunctive relief, but the respondents did not make this argument. Moreover, the dispute between AEP Ohio and NEP here is distinguishable in many ways. Not only is NEP the *Respondent* here, not the *Complainant*, but the dispute between the parties is far more complicated. *See* Entry at 13. This is not a matter of implementing a simple rule that prohibited certain switching fees; rather, it is spawned from a complex body of law that impacts utility infrastructure, results in the

"proceeding," and NEP did not seek a stay of any Commission "judgment" or order. Therefore, the Entry erred in accepting NEP's "stay" label; the requested relief was not a stay.

Instead, what NEP requested was an order requiring AEP Ohio to convert the Apartment Complexes to submetering. Far from being a "stay," what NEP requested was, in effect, a preliminary injunction. An *injunction* – including a preliminary injunction – is an order requiring a party to perform an action. "In a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam* by which, upon certain established principles of equity, *a party is required to do or refrain from doing a particular thing*." Black's Law Dictionary (11th ed. 2019, entry for "injunction") (quoting Howard C. Joyce, *A Treatise on the Law Relating to Injunctions*, § 1, at 2-3 (1909)) (emphasis added). Here, the dispute centers on whether AEP Ohio must grant NEP's request to convert the Apartment Complexes to submetering. *See* Compl. ¶ 9. In simple terms, AEP Ohio is not doing something (converting the Apartment Complexes to submetering) that NEP wants, so NEP asked the Commission to order AEP Ohio do it. That is a request for an *injunction*, not a request for a stay. It is a request that AEP Ohio be "required to do . . . a particular thing." Black's Law Dictionary (11th ed. 2019, entry for "injunction"). And by granting NEP's request, the Entry affirmatively ordered AEP Ohio to take the requested action – *i.e.*, to convert the Apartment Complexes to submetering.

There is no statute or Commission regulation authorizing an Attorney Examiner to grant an injunction or to order a utility to implement a construction request or install a certain kind of

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abandonment of customers, and impacts many rights afforded to those customers. Furthermore, here the Commission should not be effectively deciding the case through this motion for preliminary relief, because ultimately there will be a hearing on the merits as required by R.C. 4905.26.

service. And there is certainly no authority for an Attorney Examiner to order a utility to do this on a *preliminary* basis, prior to a hearing on the merits. The Entry did not relate to any "procedural matters" under O.A.C. 4901-1-14. It did not relate to the procedural schedule, discovery, admission of evidence, and the like. Rather, the Entry went to the heart of the merits of this complaint – *i.e.*, whether AEP Ohio must convert the Apartment Complexes to submetering. *See* Compl. ¶ 8. And the Entry essentially granted NEP a preliminary injunction on that question. That is a substantive matter that falls outside the scope of the Attorney Examiner's authority.

Because the Entry exceeded the Attorney Examiner's authority, the Commission should consider AEP Ohio's interlocutory appeal as of right. Although this reason does not fall within one of the four enumerated bases for an interlocutory appeal as of right in O.A.C. 4901-1-15(A), the error is just as important and prejudicial as the four enumerated bases, if not more so. Obviously, the interlocutory appeal rule does not contemplate an Entry violating due process or exceeding the Commission's own statutory authority. The Entry has made a preliminary, substantive ruling that goes to the heart of the merits of this case without consultation with the Commission and without clarifying the impact the ruling has on the case going forward. The Entry has ordered AEP Ohio to abandon over 1,000 of its customers and expend the time and money necessary to convert the Apartment Complexes to submetering. The Entry has effectively given NEP everything it wants on a preliminary basis – and even though NEP has not filed before this Commission[4] any counterclaim or complaint of its own against the Company. Such

[4] As the Commission is now aware, NEP did attempt unsuccessfully to obtain this same relief from the Franklin County Court of Common Pleas. *See* Decision Granting Defendant Ohio Power Company, DBA AEP Ohio's Motion to Dismiss at 1, *Nationwide Energy Partners, LLC v. Ohio Power Co.*, Case No. 21CVH07-7186 (Franklin Cty. Court of Common Pleas, Dec. 3, 2021), Attachment A to AEP Ohio's Notice of Additional Authority, Case No. 21-0990-EL-CSS (Dec. 8, 2021).

matters should not be decided by the Attorney Examiner acting alone, without the approval of the Commission.

B. In the alternative, the interlocutory appeal should be certified to the Commission because it raises important and novel questions of law concerning the Commission's authority to grant preliminary relief.

In the alternative to an interlocutory appeal as of right, AEP Ohio requests that this appeal be "certified to the Commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer" under O.A.C. 4901-1-15(B). An appeal may be certified under that provision if it "presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question." O.A.C. 4901-1-15(B). This appeal fulfills several of those factors.

First, this appeal raises numerous novel questions of "interpretation, law, or policy" regarding the power and propriety of the Commission (or Attorney Examiner) to grant preliminary relief in a complaint proceeding under R.C. 4905.26. These questions include, at a minimum:

- Whether the Commission is authorized by statute to grant preliminary, substantive relief prior to a hearing on the merits under R.C. 4905.26 (it is not, as AEP Ohio explains *infra* Sections II.A-II.B).
- Whether preserving the *status quo* means ordering a utility to take affirmative action to abandon its customers and change the form of electric service it has provided for years (it does not, as AEP Ohio explains *infra* Section II.C).
- Whether it is appropriate to grant preliminary, substantive relief to a party where "determining the likelihood of prevailing on the merits at such an early stage in a proceeding is a nebulous undertaking," Entry at 13 (it is not, as AEP Ohio explains *infra* Subsection II.D.1).

- Whether it is appropriate to grant preliminary, substantive relief to a party based solely on its unsupported and generic "representations" of possible harm, Entry at 13 (it is not, as AEP Ohio explains *infra* Subsection II.D.2).

A certified interlocutory appeal is also "needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question." O.A.C. 4901-1-15(B). The effect of the Entry is to require AEP Ohio to expend time and money on the construction to convert the Apartment Complexes to submetering. If the Commission ultimately rules in AEP Ohio's favor, AEP Ohio will then have to expend more time and money to re-convert the Apartment Complexes so that AEP Ohio can again directly serve the tenants. An interlocutory appeal is necessary to prevent AEP Ohio from having to expend these resources on what may ultimately be a wasteful and pointless task. The better course is to preserve the *status quo* by allowing AEP Ohio to continue to provide electric service directly to the tenants (as it has done for years) so that AEP Ohio (and, for that matter, NEP) do not expend resources on a project that may turn out to be unnecessary. This is especially true given that NEP's service requests are approximately the same vintage as the Supreme Court's abandonment of the Commission's modified *Shroyer* test and remand order to the Commission; both issues need to be resolved on an equally urgent basis, and preserving the true *status quo* is the most logical and fair approach.

As discussed in more detail below, *see infra* Sections II.D.3 and II.D.4, AEP Ohio and customers will suffer undue prejudice absent an immediate determination by the Commission. Once converted, Apartment Complex Customers will be deprived of numerous guaranteed rights and protections under Ohio law, such as the right to shop for generation supply, the right to participate in the percentage of income payment program ("PIPP"), disconnection procedures related to notice and prohibitions on disconnecting service during the winter and for customers

with medical issues. Additionally, without an immediate ruling affirming the *status quo*, the merits of AEP Ohio's complaint case can be upended. The *status quo* will be disrupted and AEP Ohio will lose customers without the Commission weighing in on the decision after a full hearing. Once conversion is in process or completed, NEP will undoubtedly try to argue that this complaint case is moot once the conversion has taken place. At best, AEP Ohio will have to incur significant costs to re-convert the five properties, which will also create significant customer confusion, in the event the Commission were to still proceed in this matter and find in AEP Ohio's favor. These incremental costs will ultimately be borne by all AEP Ohio customers, not just the 1,000 customers at issue in this matter. Although AEP Ohio's memo opposing the stay request noted (at 5) that "a ruling granting NEP's Motion without further clarification could potentially moot AEP Ohio's complaint," the Entry failed to clarify this issue. To the extent the Commission does not reverse the Entry, it should clarify that the interim relief is without prejudice to the merits and explain that conclusion.

II. The Commission should reverse the Entry and deny NEP's motion for a "stay."

"Upon consideration of an interlocutory appeal, the commission may, in its discretion, . . . reverse . . . the ruling." O.A.C. 4901-15(E)(1). For the five primary reasons set forth below, the Commission should reverse the Entry and deny NEP's motion. First, as a matter of law, there is no statutory basis for preliminary relief in a complaint case under R.C. 4905.26. Second, the interpretation of AEP Ohio's tariff is a merits issue that can be decided only after hearing, and AEP Ohio cannot simply "follow its tariff" without clarity on whether NEP is a "public utility" and without further clarification of the Supreme Court's remand order. Third, the Entry misunderstood the *status quo*; it cannot be reasonably disputed that preserving the actual *status quo* means that AEP Ohio should continue its years-long service to the Apartment Complex

Customers pending a decision on the merits. Fourth, as explained in detail below, the Entry misapplied the burden of proof for preliminary relief, and NEP has failed to establish a right to preliminary relief under the four-prong test. Finally, NEP's requested relief should be rejected since it is flatly inconsistent with its motion to dismiss.

A. There is no statutory basis for preliminary relief in a complaint case under R.C. 4905.26.

As explained above, the relief NEP requested is not a "stay." It is, instead, preliminary relief on the merits, comparable to a preliminary injunction. The distinction is important because the Commission lacks statutory authorization to grant preliminary relief in a complaint case such as this. Under R.C. 4905.26, the Commission may grant the relief NEP requested *only after a hearing on the merits.*

Assuming for the sake of argument that the Commission has inherent power to issue a true stay in a complaint case – that is, a stay of its own proceedings[5] or a stay of the effect of its own orders – the Commission has no statutory authority to grant preliminary relief in a complaint proceeding. The Commission "has no authority to act beyond its statutory powers." *Wingo*, 2020-Ohio-5583, ¶ 8 (quoting *Discount Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53, ¶ 51). Neither the complaint statute on which this proceeding is founded, R.C. 4905.26, nor any other statute authorizes the Commission to grant preliminary relief prior to hearing. Instead, R.C. 4905.26 provides that if a complainant has set forth "reasonable grounds for complaint," the Commission "*shall fix a time for hearing*." R.C. 4905.26 (emphasis added). No language in R.C. 4905.26 or elsewhere permits the Commission, much less an Attorney Examiner, to grant relief prior to a hearing.

[5] R.C. 4905.26 provides that the Commission "may adjourn such hearing from time to time."

It is telling that NEP moved for a temporary restraining order ("TRO") and preliminary injunction in the now-dismissed civil action it filed against AEP Ohio.[6] NEP styled its requested relief to the court as a TRO and preliminary injunction because there is no question that Ohio courts are authorized to grant preliminary relief prior to a final determination on the merits. *See generally* Ohio R. Civ. P. 65. But NEP misleadingly styled its request for preliminary relief to the Commission as a motion for a "stay," since the Commission lacks authority to grant a preliminary injunction, TRO, or other preliminary relief prior to a hearing. The Commission should not be fooled by NEP's changing labels. In substance, the relief NEP requested in its motion for a stay is the exact same relief it requested in its motion for a TRO or preliminary injunction in its civil action – an order requiring AEP Ohio to grant NEP's work order requests and convert the Apartment Complexes to submetering.[7] The Commission must respect the judgment of the General Assembly that granted the power to provide preliminary relief to the courts but declined to grant that power to the Commission.

To be clear, the Commission *will* be authorized to grant the relief NEP requests (*i.e.*, an order requiring AEP Ohio to convert the Apartment Complexes) after the Commission conducts the required hearing under R.C. 4905.26. *See, e.g.*, R.C. 4905.38; *Elyria Telephone Co. v. Pub. Util. Comm.*, 158 Ohio St. 441 (1958). If the Commission were to conduct the hearing required by R.C. 4905.26 and determine that NEP is *not* an unlawful "public utility" under Ohio law, and

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[6] In its complaint, NEP sought "a temporary restraining order as well as preliminary and permanent injunctive relief." Compl. ¶ 147, *Nationwide Energy Partners, LLC v. Ohio Power Co.*, Case No. 21CVH07-7186 (Franklin Cty. Court of Common Pleas, Nov. 12, 2021) ("NEP Civil Action Complaint"). NEP's complaint is available on the court's electronic docket, https://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/.

[7] NEP alleged that it had submitted work order requests to AEP Ohio for AEP Ohio "to perform the work required to change the utility service to AEP master meter single account service" at the Apartment Complexes. *E.g.*, NEP Civil Action Compliant ¶ 39. NEP further alleged that AEP Ohio had unlawfully "withheld[] the completion" of those work orders. *Id.* ¶ 147. NEP therefore sought "a temporary restraining order as well as preliminary and permanent injunctive relief, precluding AEP from intentionally and unlawfully withholding the completion of work orders." *Id.*

if this ruling were upheld on appeal, then the Commission could hold that AEP Ohio must provide master-metered service to the Apartment Complexes. But the Commission has no authority to make this determination on a preliminary basis, prior to hearing.

B. The interpretation of AEP Ohio's tariff is a merits issue that can be decided only after hearing, and AEP Ohio cannot simply "follow its tariff" without clarity on whether NEP is a "public utility" and without further clarification of the Supreme Court's remand order.

Both NEP and the Entry couched the requested relief as an order for AEP Ohio to "continue to follow its tariff and past practices regarding master-metered services." Entry at 14-15. This reasoning is erroneous for two reasons:

First, as explained above, the Commission lacks statutory authority to grant preliminary relief in a complaint case under R.C. 4905.26 (or any other statute), and this gap in authority cannot be filled by couching the preliminary ruling as a tariff interpretation. The interpretation of a tariff in a complaint case is a merits issue. There is no question that the Commission is authorized to decide this merits issue through its statutory power to establish and interpret utility tariffs. *See, e.g.*, R.C. 4905.22. But the Commission may not do so in a complaint case under R.C. 4905.26 until *after a hearing.* The statute plainly requires that the Commission "*shall fix a time for hearing*," R.C. 4905.26 (emphasis added), and it contains no language granting authority to issue a ruling prior to a hearing.

Second, ordering AEP Ohio to "continue to follow its tariff and past practices," Entry at 14-15, is injunctive relief, which, again, is not statutorily authorized prior to a hearing. Having failed in its request for a TRO or preliminary injunction in the Franklin County Court of Common Pleas,[8] NEP made essentially the same request to the Commission in its "stay" motion.

[8] *See supra* note 5.

The General Assembly, however, has established different powers and procedures for the Commission than for the courts of common pleas. Whereas courts may grant injunctive relief on a preliminary basis, *see* Ohio R. Civ. P. 65, the Commission may require AEP Ohio to take a certain action only after a hearing, *see* R.C. 4905.26.

Third, in the wake of *Wingo*, AEP Ohio cannot simply "continue to follow its tariff" as the Entry states. *See* Entry 14-15. Incredibly, neither NEP nor the Entry ***ever quote the language in AEP Ohio's tariff they are referring to***. NEP argues that "AEP Ohio seeks to unilaterally change a 22-year interpretation of its tariffs," but it fails to quote the tariff language in question or even identify which provision it is referring to. The Entry makes the same error, finding that AEP Ohio "has stopped following its tariff" – and ordering AEP Ohio to "continue to follow its tariff" – without ever identifying which provision of AEP Ohio's tariff the Entry is referring to. Entry at 13, 15-16.

The applicable provision of AEP Ohio's tariff is Section 18 of the Terms and Conditions of Service,[9] which provides in full:

> 18. RESALE OF ENERGY
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> Electric service will not be supplied to any party contracting with the Company for electric service (hereinafter in this Section called "Customer") except for use exclusively by (i) the Customer at the premises specified in the service request on contract between the Company and the Customer under which service is supplied and (ii) the occupants and tenants of such premises.
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> *A customer cannot engage in a resale of electricity if the resale would constitute the activities of an electric light company under Section 4905.03 of the Ohio revised Code*. In addition, resale of energy will be permitted for electric service and related billing as they apply to the resale or redistribution of electrical service from a landlord to a tenant *where the landlord is not operating as a public utility*,

[9] There is no "master-metered" schedule in AEP Ohio's tariff. A multifamily building served by a single meter takes service under the applicable general service schedule. All service is governed by the tariff's Terms and Conditions of Service.

> and the landlord owns the property upon which such resale or redistribution takes place.

Tariff of Ohio Power Company, P.U.C.O. No. 21, Original Sheet No. 103-13 (emphasis added).[10] As shown above, the plain language of AEP Ohio's tariff prohibits resale in multifamily buildings "if the resale would constitute the activities of an electric light company" or where the landlord is operating as a "public utility." Applying this section of AEP Ohio's tariff to NEP does not require an interpretation of the *tariff*, as both NEP and the Entry erroneously reason. There is no need to interpret the tariff because plain language is unmistakable and prohibits resale by "public utilities." Rather, the relevant interpretation is not of AEP Ohio's tariff, which is clear, but of the *statute* defining "electric light company" and "public utility." And only the Commission and the Ohio Supreme Court may interpret the statute. Thus, the Entry's directive to follow the tariff is circular and begs the central question presented in this case; the Supreme Court's remand needs to be decided in order to decide the proper application of AEP Ohio's applicable tariff.

NEP and the Entry seem to suggest that AEP Ohio's alleged "22-year interpretation of its tariffs" involved AEP Ohio interpreting the statutory term "public utility," and that AEP Ohio should somehow revert to *AEP Ohio's* previous interpretation of the statute. That is erroneous because AEP Ohio has never interpreted "public utility" on its own. The Entry erroneously took NEP's claim of a "22-year history" at face value, but that claim is highly exaggerated and without proper context. For many years after it was founded, NEP's activities were relatively insignificant. Once NEP expanded to serving customers in numerous buildings in AEP Ohio's service territory, NEP's gained a more prominent public profile, and soon thereafter the

[10] Available at https://www.aepohio.com/lib/docs/ratesandtariffs/Ohio/2021-12-1_AEP_OhioTariff.pdf.

Commission began its investigation into submetering, Case No. 15-1594-AU-COI. AEP Ohio's comments in that proceeding and in other proceedings involving submetering strongly opposed submetering and urged the Commission to find that third-party submetering companies such as NEP are unlawfully operating as "public utilities" under Ohio law. It is disingenuous, therefore, for NEP and the Entry to attribute a "22-year interpretation of its tariffs" to AEP Ohio. Not only is 22 years an exaggerated time period, but the interpretation has never been *AEP Ohio's*. Rather, AEP Ohio has followed the *Commission's* interpretation, with which AEP Ohio consistently and strenuously disagreed.

Now, after *Wingo*, there is no valid Commission or Supreme Court precedent applying the statutory definition of "public utility" to third-party submetering companies such as NEP. *Wingo* vacated the Commission's previous ruling that NEP is not a public utility, and it remanded the question to the Commission to consider it anew. NEP (and presumably the Attorney Examiner, although the Entry is not clear) would have AEP Ohio "interpret" its tariff pursuant to pre-*Wingo* precedent such as *Pledger*[11] and *FirstEnergy*,[12] which had formerly been used to justify NEP's form of submetering. But AEP Ohio cannot "interpret" its tariff according to *Pledger* and *FirstEnergy* because the clear import of *Wingo* is that these cases *do not govern third-party submetering companies* such as NEP. Indeed, there would have been no need for the remand order in *Wingo* if the Supreme Court believed that *Pledger* and *FirstEnergy* governed here. Therefore, neither the preliminary relief question or the merits of the case are resolved by directing the Company to "continue to follow its tariff," Entry 14-15, because AEP Ohio's tariff

[11] *Pledger v. Pub. Util. Comm.*, 2006-Ohio-2989.
[12] *FirstEnergy Corp. v. Pub. Util. Com.*, 96 Ohio St. 3d 371 (2002).

prohibits resale by public utilities, and there is currently no settled law in the wake of *Wingo* that applies "public utility" to NEP.

C. The Entry misunderstood the *status quo*; it cannot be reasonably disputed that preserving the actual *status quo* means that AEP Ohio should continue its years-long service to the Apartment Complex Customers pending a decision on the merits.

"The purpose of a preliminary injunction ordinarily is to preserve the *status quo* pending a trial on the merits." *Newburgh Hts. v. State*, 2021-Ohio-61, ¶ 12 (8th Dist.) (citing *Mears v. Zeppe's Franchise Dev.*, 2009-Ohio-27, ¶ 23 (8th Dist.)). In granting NEP preliminary relief, the Entry violated this principle by misunderstanding the meaning of "*status quo*" in the context presented here. The *status quo* is the current state of affairs, what is happening *right now*. What is happing right now is that AEP Ohio is serving the Apartment Complex Customers directly, as AEP Ohio has done for many years. The Entry disrupted this current state of affairs by ordering AEP Ohio to abandon its service to the Apartment Complex Customers and reconfigure the Apartment Complexes for submetering. That is not preserving the *status quo*; that is ordering a change in the *status quo* – and it is the very change that AEP Ohio proactively brought this complaint case to prevent through resolution of the Supreme Court's remand order to the Commission.

The Entry mistakenly identified the *status quo* as "AEP Ohio continu[ing] to follow its tariff and past practices regarding master-metered services during the pendency of this case." Entry at 14. That is not the *status quo*. As discussed above, *see supra* Section II.B, it makes no sense for AEP Ohio to "follow its tariff" because its tariff expressly incorporates a legal term, "public utility," for which there is no current application to NEP. AEP Ohio simply cannot "follow its tariff" until the Commission rules on whether NEP is a "public utility." That is the

raison d'etre for AEP Ohio to proactively file the complaint and seek a Commission determination of the issue.

Moreover, the *status quo* for the Apartment Complexes is not what AEP Ohio has done at other buildings at other times. What the Entry erroneously identified as the *status quo* here is in fact the *status quo* for the 164 buildings in AEP Ohio's service territory where NEP already operates. And AEP Ohio is preserving this *status quo* for these 164 buildings by continuing to provide master-metered service. The *status quo* for the Apartment Complexes, by contrast, is that AEP Ohio is serving the tenants directly, and this current state of affairs is what should be preserved pending a ruling on the merits.

D. The Entry misapplied the burden of proof for preliminary relief, and NEP has failed to establish a right to preliminary relief under the four-prong test.

Even if the Commission is authorized by statute to grant preliminary relief (it is not), the Entry made numerous errors in applying the four-part test for granting a stay or preliminary relief,[13] and NEP has failed to demonstrate its right to preliminary relief under the appropriate standard.

[13] As noted above, the Attorney Examiner erroneously called the requested relief a "stay." It is not a "stay," but rather preliminary relief akin to a preliminary injunction. This distinction is important, as explained above, because even if the Commission has authority to stay its proceedings or orders, it does *not* have statutory authority to grant preliminary relief. However, in this Section discussing the four-part test, the distinction is less relevant, because the Commission's four-part test for granting a stay is materially the same as the standard for a preliminary injunction. *See, e.g.*, *TRG Enterprises, Inc. v. Kozhev*, 2006-Ohio-2915, ¶ 11 (2d Dist.) ("In determining whether to grant injunctive relief, the court considers the following factors: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction.").

1. Preliminary, substantive relief cannot be granted to NEP where "determining the likelihood of prevailing on the merits at such an early stage in a proceeding is a nebulous undertaking," Entry at 13.

On the first factor, likelihood of success on the merits, the Entry profoundly misapplied the burden of proof. "Because an injunction is an extraordinary remedy, 'the moving party has a substantial burden to meet in order to be entitled' to a preliminary injunction." *Newburgh Hts. v. State*, 2021-Ohio-61, ¶ 12 (quoting *KLN Logistics Corp. v. Norton*, 2008-Ohio-212, ¶ 11 (8th Dist.)); *see also, e.g.*, *Garono v. Ohio*, 37 Ohio St. 3d 171, 173 (1988) ("An injunction is an extraordinary remedy in equity where there is no adequate remedy available at law. It is not available as a right but may be granted by a court if it is necessary to prevent a future wrong that the law cannot."). "The party seeking the preliminary injunction must establish a right to the preliminary injunction by showing *clear and convincing evidence* of each element of the claim." *Id.* (emphasis added) (citing *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 786, 790, 673 N.E.2d 182 (10th Dist. 1996)); *see also Southwestern Ohio Basketball, Inc. v. Himes*, 2021-Ohio-415, ¶ 33 (12th Dist.); *Youngstown City Sch. Dist. Bd. of Ed. v. Ohio*, 2018-Ohio-2532, ¶ 9 (10th Dist.). "Clear and convincing evidence is more than a preponderance of the evidence but less than evidence beyond a reasonable doubt; it consists of evidence which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Youngstown*, 2018-Ohio-2532, ¶ 9.

Here, however, the Entry did not find that NEP had met its "substantial burden" to show a likelihood of success by "clear and convincing evidence." In fact, the Entry did not find that NEP was likely to succeed on the merits *at all*. Instead, the Entry merely observed that "determining the likelihood of prevailing on the merits at such an early stage in a proceeding is a nebulous undertaking." Entry at 13. Yet the Entry still granted NEP preliminary relief. That

turns the burden of proof upside down. If NEP has not established a likelihood of success on the merits, it is not entitled to preliminary relief.

The Entry further reasoned that "the burden in this case remains on AEP Ohio to show that NEP is operating as a public utility." Entry at 13. This too was a clear error. Regardless of which party has the burden of proof on the *merits*, the burden of proof to obtain preliminary relief is on the moving party, here NEP. *Newburgh Hts. v. State*, 2021-Ohio-61, ¶ 12 ("The party seeking the preliminary injunction must establish a right to the preliminary injunction by showing *clear and convincing evidence* of each element of the claim.").

As AEP Ohio observed in its Memorandum Contra NEP's Motion for a "Stay" (at 7-9), NEP has made no real attempt to meet its burden of establishing likelihood of success on the merits. Its analysis of this factor consisted of a single page of argument. *See* NEP Memorandum in Support at 4-5. That argument, moreover, relied entirely on previous case law that does not apply to NEP after *Wingo*, as the Entry expressly acknowledged. Entry at 12 ("[T]he Supreme Court's reversal of the Wingo decision necessitates a reconsideration of the status of third-party submetering companies such as NEP."). Without clear and convincing evidence of its likelihood to succeed, NEP's "stay" motion should be denied, and the merits of this case should be decided by the Commission only after a full examination of the relevant facts at hearing, where all parties are given a chance to present their positions in a full and orderly manner.

2. NEP's mere "representations" of possible harm do not establish the irreparable harm required for preliminary relief.

On the second factor, the Entry again misapplied the burden of proof and erroneously found in favor of NEP despite NEP's lack of support for its claims. The Entry accepted "NEP's representations" that it would suffer reputational harm, "*may* lose access to *potential* new customers," and "*may* not be able to employ or maintain employees." Entry at 13 (emphasis

added). This was an error because "representations" do not satisfy the "clear and convincing" standard, nor does speculation about harms that "may" occur. *See, e.g.*, *TRG Enterprises, Inc. v. Kozhev*, 2006-Ohio-2915, ¶¶ 23, 40 (2d Dist.) (recognizing that "irreparable harm" requires "substantial threat of material injury" and upholding the denial of a preliminary injunction because "the evidence presented was too vague to establish irreparable harm"); *Youngstown*, 2018-Ohio-2532, ¶ 9 (preliminary injunction standard requires showing of "immediate and irreparable injury").

Tellingly, the Entry's analysis of the second factor does not cite the evidence that NEP put forward in support of its claims of irreparable harm, and that evidence falls far short of meeting NEP's burden of proof to obtain preliminary relief. NEP's evidence consists of a single affidavit that provides no detail supporting its bald claims. As to NEP's employment claims, NEP does not allege that it has or will lay off any employees. NEP only alleges that it is "very *concerned* that AEP Ohio's actions are jeopardizing the continued employment of its construction team and its support staff." Ringenbach Aff. ¶ 16 (emphasis added). A "concern" about potential future harm does not provide "clear and convincing" evidence of "irreparable harm." NEP also fails to substantiate the alleged "reputational harm" that the Entry credited. The only detail provided by NEP's affidavit is that "NEP's contractor pulled out from each of the five apartment complexes and invoiced NEP for work it completed." Ringenbach Aff. ¶ 14. Yet NEP's affidavit does not provide any detail showing that the contractor "pull[ing] out" caused NEP any harm. Nor does NEP allege that this harm is *irreparable*, which is a critical element of the standard, because NEP does not allege that it will be unable to rehire this contractor if it prevails on the merits. A court would not grant the "extraordinary remedy" of a preliminary

injunction on the basis of such meager, unsupported evidence of "irreparable harm." Nor should the Commission.

The Entry also failed to weigh the evidence that AEP Ohio put forward disputing NEP's claim of irreparable harm. NEP asserted that its "entire business is in jeopardy as its ability to complete the existing five construction projects and seek new business is being harmed," NEP Mem. in Supp. at 6, and the Entry appeared to credit this claim. Yet AEP Ohio submitted undisputed evidence showing that AEP Ohio is continuing to provide master-metered service to 164 existing buildings in AEP Ohio's service territory that are already being submetered and served by NEP. Rybalt Aff. ¶ 9, Attached to AEP Ohio Mem. Contra NEP Stay Motion. There is no disruption to this part of NEP's business, which is most of NEP's business, that is properly attributed to AEP Ohio. AEP Ohio also put forward evidence showing that AEP Ohio is going forward with NEP's requests to install master-metered service on 8 new multifamily buildings in AEP Ohio's service territory. Ringenbach Aff. ¶ 13, Attached to NEP Stay Motion. The Entry recited this evidence in explaining the parties' positions, but it did not weigh or even address this evidence in its *analysis* of the second factor. *See* Entry at 13. That is plainly improper and contrary to the applicable legal standard. The Entry cannot determine that NEP has shown clear and convincing evidence of irreparable harm to its "entire business" without weighing the contrary evidence submitted by AEP Ohio. Such competing claims are reasons why courts often hold hearings on preliminary injunctions to weigh conflicting evidence, or consolidate a preliminary injunction hearing with a trial on the merits. *See* Ohio R. Civ. P. 65(B)(2). Here, where the Commission is not even statutorily authorized to provide the requested preliminary relief, it should compound that error by granting the relief without a proper weighing of the evidence.

3. Granting NEP's requested relief will cause harm to third parties (*i.e.*, over 1,000 AEP Ohio customers), and relying on now-vacated legal precedent does not justify ignoring this harm.

On the third factor, the Entry found that "granting the stay would not cause substantial harm to other parties." This finding is remarkable given the extensive harm to customers caused by submetering that AEP Ohio and the Ohio Consumers' Counsel have detailed in their pleadings. As described in detail in AEP Ohio's Complaint (¶¶ 52-66) and its Memorandum Contra NEP's "Stay" Motion (at 9-11), the Apartment Complex Customers will lose numerous rights and benefits conferred by law and Commission regulation if AEP Ohio were forced to reconfigure the Apartment Complexes for submetering. These include, without limitation, rights to shop for generation service, to participate in budget billing and low-income assistance programs, to be protected from unreasonable disconnections, and to be charged only pursuant to Commission-approved, publicly available rates.

Not once in its numerous filings has NEP denied these harms to customers or attempted to justify submetering as good for customers. The Entry brushed off these customer harms by repeating NEP's false claim that they "[i]gnore the prior two decades of AEP Ohio allowing master-metered service . . . in line with AEP Ohio's tariff and Commission precedent." Entry at 14. That reasoning is faulty because the previous "Commission precedent" is no longer applicable after *Wingo*, as the Entry recognized by acknowledging that "the *Wingo* decision necessitates a reconsideration of the status of third-party submetering companies such as NEP." Entry at 12. As described above, *see supra* Section II.B, the citation to AEP Ohio's tariff is faulty for the same reason. Again, resolving the Court's 2020 remand order is the primary reason AEP Ohio brought this complaint and that set of issues remains at the center of the dispute.

The Commission (and, in following its precedent, AEP Ohio) begrudgingly allowed the harms of submetering to befall customers not because that was good policy but because the Commission believed that this was required by law. Now that this legal justification has been vacated by *Wingo*, the Commission's grounds for turning a blind eye to the harms of submetering has gone away. The Commission should instead acknowledge the harms of submetering and do everything it can to prevent them – preferably permanently, but at a minimum, until the Commission reaches a final decision on the merits.

4. NEP has never genuinely made the case that submetering is in the "public interest," and granting NEP preliminary relief is not in the public interest here.

In finding that "the public interest lies in favor of NEP," the Entry did not cite any affirmative evidence offered by NEP in support of this factor. The Entry merely criticized AEP Ohio (incorrectly) for not addressing this factor and OCC for repeating its arguments for the third factor. This reasoning was erroneous and should be overturned on appeal.

As an initial matter, AEP Ohio *did* address this fourth factor through its discussion of harm to the over 1,000 customers that AEP Ohio is being forced to abandon. What happens to these customers is clearly part of the "public interest," and the fact that this consideration overlaps with the third factor does not diminish its force. Contrary to the Entry's finding, the public interest harms related to abandoning AEP Ohio's existing customers involve in this case were affirmatively and extensively addressed in AEP Ohio's memo contra the motion for stay. *See* AEP Ohio Memo Contra Stay at 2 (strong objection to losing customers through conversions as part of requested relief); *id.* at 3 (NEP relief would disrupt *status quo* by abandoning existing customers); *id.* at 4 (primary question in complaint is whether AEP Ohio must abandon its customers); *id.* at 5 (Commission cannot order the Company to abandon its customers without a

hearing); *id.* at 6 (AEP Ohio has merely taken action to deny request to abandon its customers); *id.* at 7 (preliminary relief should be denied to allow AEP Ohio to continue serving existing customers); *id.* at 9-11 (irreparable harm to Company of losing existing customers would be caused by granting preliminary relief); *id.* at 13 (AEP Ohio unwilling to voluntarily give up customers in light of current legal uncertainty). Neither NEP nor the Entry cite any authority holding that the evidence supporting the third and fourth factor cannot be similar. That would be the case any time where, as here, a requested injunction will harm numerous members of the public – these members of the public are both "third parties" under the third factor and embody the "public interest" under the fourth factor. And it is not uncommon for courts to analyze the third and fourth factors simultaneously. *See, e.g.*, *Youngstown*, 2018-Ohio-2532, ¶¶ 41-45.

Moreover, the Entry's discussion of the fourth factor again misapplies the standard of proof. The burden is on NEP to establish that its requested preliminary relief is in the public interest; the burden is not on AEP Ohio and the OCC to disprove it. *See, e.g.*, *Newburgh Hts.*, 2021-Ohio-61, ¶ 12 ("[T]he moving party has a substantial burden to meet in order to be entitled to a preliminary injunction." (quotations omitted)).

Lastly, NEP does not genuinely dispute that the public would be better off if third-party submetering companies were not allowed to operate in Ohio (as they are prohibited from operating in other states). The only harms alleged by NEP relate solely to their own private interests. The ultimate question in this case must rest on the meaning of the statute, not public policy considerations, as *Wingo* made clear. 2020-Ohio-5583, ¶ 22-26. But insofar as it is permissible to address the "public interest" through the fourth factor of the test for preliminary relief, the Commission must acknowledge that submetering is harmful. As noted above, none of NEP's many filings in this case or in any other Commission proceeding have ever disputed the

harms of third-party submetering or identified any good that comes from third-party submetering. The Commission should schedule a hearing to determine the ultimate statutory question, but solely in the context of this motion, the Commission should act in favor of the public interest and limit the reach of this harmful practice – at least while this case remains pending.

E. NEP's requested relief should be denied because it is flatly inconsistent with its motion to dismiss.

As a final reason for denying NEP's motion, preliminary relief was inappropriate because NEP has not filed any claims or counterclaims in this case. To the contrary, NEP has sought to *dismiss* this case as unripe. This contradiction further illuminates the procedural impropriety of both NEP's request for a stay and the Entry granting that request.

Consider the absurdity of NEP's contradictory positions: NEP has sought to dismiss this case as unripe. If NEP prevails on this motion to dismiss, then this proceeding and the temporary "stay" will go away. At that point, AEP Ohio will continue to refuse to process NEP's work order requests, and NEP will not be able to submeter the Apartment Complexes. That is obviously not what NEP wants.

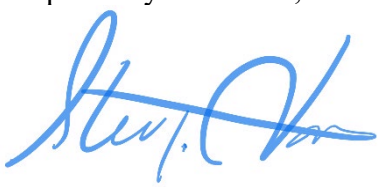
Instead, NEP wants *affirmative relief*, *i.e.*, an order from the Commission requiring AEP Ohio to reconfigure the Apartment Complexes pursuant to NEP's request. That is precisely what NEP requested – and the Entry erroneously granted – as a "stay." Yet this cannot be reconciled with NEP's position that this case should be dismissed. NEP cannot have it both ways – both seek to dismiss this case and seek to *win* this case through an affirmative judgment in its favor.

CONCLUSION

For the foregoing reasons, the Commission should hear this interlocutory appeal as of right under O.A.C. 4901-1-15(A), or in the alternative an interlocutory appeal should be certified

to the Commission under O.A.C. 4901-1-15(B). The Commission should reverse the Entry and should deny NEP's motion for a "stay."

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 was sent by, or on behalf of, the undersigned counsel to the following parties of record this 3rd day of January, 2022, via email.

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THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF OHIO POWER COMPANY,

COMPLAINANT,

CASE NO. 21-990-EL-CSS

V.

NATIONWIDE ENERGY PARTNERS, LLC,

RESPONDENT.

ENTRY

Entered in the Journal on December 28, 2021

I. SUMMARY

{¶ 1} The attorney examiner finds that Nationwide Energy Partners, LLC has demonstrated that a stay in this case should be granted.

II. PROCEDURAL HISTORY

{¶ 2} On September 24, 2021, the Ohio Power Company (AEP Ohio or the Company) filed a complaint against Nationwide Energy Partners, LLC (Nationwide). As background, AEP Ohio states that it is a "public utility" under R.C. 4905.02, an "electric light company" under R.C. 4905.03 and 4928.01, and an "electric utility" and "electric distribution utility" as those terms are defined in R.C. 4928.01. AEP Ohio further explains that it has been granted a service territory under the Certified Territory Act, within which AEP Ohio has the exclusive right to provide electric distribution service and other noncompetitive electric services. *See* R.C. 4933.83(A). In the complaint, AEP Ohio states that NEP is an entity engaged in the practice of submetering, whereby NEP, acting as the agent of a landlord or building owner engages in the resale or redistribution of public utility services where the owner of an apartment building or multi-residential complex divides up a master bill to individual tenants so that each tenant pays for their share of utilities used. AEP Ohio explains that this complaint arises from a request from NEP, acting as the agent of five apartment complex owners (Apartment Complexes), that AEP Ohio establish master-

metered service at the Apartment Complexes, which AEP Ohio asserts would amount to NEP taking over electric distribution service to the tenants in the Apartment Complexes. AEP Ohio alleges that NEP intends to purchase electric service from AEP Ohio at wholesale-like master-metered rates and then resell electric service to the individual Apartment Complex tenants at a considerable markup.

{¶ 3} In the complaint, AEP Ohio alleges that allowing NEP to begin submetering at the Apartment Complexes would violate numerous statutes and Commission regulations, including the Certified Territory Act, as NEP would be operating as a public utility. AEP Ohio asserts that while NEP has operated in this capacity for many years, the question of whether third-party submetering companies such as NEP are public utilities is now unsettled following the Supreme Court of Ohio's decision in *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617 (*Wingo*). In *Wingo*, the Supreme Court struck down the "modified *Shroyer* test," which is the Commission's most recent test for determining whether submetering companies are public utilities under Ohio law. As the complaint in the remanded *Wingo* case before the Commission was subsequently dismissed at the request of the complainant, the Commission has yet to address the proper test for determining whether submetering companies are acting as public utilities. Based upon the facts presented in the request for master-metered service at the Apartment Complexes, AEP Ohio asks the Commission to take up the jurisdictional inquiry envisioned by the Court in the *Wingo* remand dismissal entry and address whether NEP and other submetering companies are operating as public utilities. In its prayer for relief, AEP Ohio requests, among other things, a determination that if NEP's work requests were permitted at the Apartment Complexes that NEP would be operating as an electric light company, a public utility, and an electric supplier and an uncertified retail electric service provider and therefore violating the Certified Territory Act. AEP Ohio further asks for a finding and order enjoining NEP from taking over electric distribution service to the customers residing at the Apartment Complexes.

{¶ 4} On October 18, 2021, NEP filed its answer to the complaint. NEP admits that AEP Ohio is a public utility subject to the Commission's jurisdiction and that AEP Ohio has been granted an exclusive territory to provide electric distribution service under the Certified Territory Act. NEP admits that it provides certain management services to property owners, managers, and developers pursuant to private contractual agreements. NEP further admits that pursuant to its contractual obligations and as the authorized representative of each property owner, manager, and developer, NEP receives and pays invoices from AEP Ohio's master-metered utility charge on behalf of the respective property owner, manager, and developer. NEP denies, however, that it would be "taking over" service from AEP Ohio if the requested master-metered service were set up at the Apartment Complexes. NEP further denies that it is a public utility under R.C. 4905.02 and, therefore, NEP asserts that it is not subject to the Commission's statutes and rules governing public utilities. NEP's answer also asserts a number of affirmative defenses.

{¶ 5} On October 20, 2021, NEP filed a motion to dismiss the complaint and a memorandum in support. In the motion to dismiss, NEP asserts three primary bases for dismissal: (1) that the complaint is not yet ripe; (2) that AEP Ohio has failed to state reasonable grounds for the complaint; and (3) that AEP Ohio has failed to name indispensable parties to the case. AEP Ohio filed a memorandum contra NEP's motion to dismiss on November 4, 2021. NEP filed a reply in support of its motion to dismiss on November 12, 2021.

{¶ 6} On October 28, 2021, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene and accompanying memorandum in support. OCC states that it seeks to intervene on behalf of the 1.3 million Ohio residential utility customers, which includes the tenants at the Apartment Complexes. OCC asserts that NEP's provision of submetering service could negatively impact the consumer protections that residential consumers receive when they take electric utility service from a regulated public utility such as AEP Ohio. NEP filed a memorandum contra OCC's motion to intervene on November 12, 2021. OCC filed a reply to NEP's memorandum contra on November 19, 2021.

{¶ 7} On November 24, 2021, NEP filed a motion for protective order or, in the alternative, a stay of discovery. In this motion and supporting memorandum, NEP seeks an order precluding NEP's response to the discovery requests issued by OCC until 20 days after the Commission rules on NEP's motion to dismiss and OCC's opposed motion to intervene. NEP asserts that it should not have to incur the burden and expense of responding to the discovery requests prior to these rulings, as a granting of the motion to dismiss would dispose of the case and a denial of OCC's motion to intervene would render the discovery requests moot. On December 8, 2021, AEP Ohio filed a memorandum contra NEP's motion to the extent that NEP seeks to preclude all discovery, including any propounded by AEP Ohio, until after the Commission rules on NEP's motion to dismiss. OCC filed a memorandum contra the motion on December 9, 2021. On December 15, 2021, NEP filed a reply in support of this motion.

{¶ 8} On December 8, 2021, AEP Ohio filed a notice of additional authority in which it wished to make the Commission aware of a decision which it believes bears directly on this case. In this filing, AEP Ohio attached a Decision Granting Defendant Ohio Power Company, dba AEP Ohio's Motion to Dismiss in which the Franklin County Court of Common Pleas dismissed a civil action that NEP recently brought against AEP Ohio concerning the same dispute at issue in this proceeding. *See Nationwide Energy Partners, LLC v. Ohio Power Co.*, Franklin C.P. No. 21CVH07-7186 (Dec. 3, 2021) (*Civil Case*).

{¶ 9} On December 10, 2021, NEP filed a motion for a stay and request for expedited ruling. In support of assertions made in the motion and the supporting memorandum, attached to the motion is an affidavit from Teresa Ringenbach, Vice President of Business Operations at NEP. Pursuant to this motion, described in more detail below, NEP moves for a stay from AEP Ohio denying its construction requests for master-metered service at buildings where owners have engaged NEP's services. On December 17, 2021, both OCC and AEP Ohio filed memoranda contra NEP's motion for a stay.

III. MOTION FOR A STAY

A. Standard of Review

{¶ 10} The Commission has adopted a four-factor test to determine whether a stay should be granted in a Commission proceeding. Specifically, the Commission will consider:

(1) Whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits;

(2) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;

(3) Whether the stay would cause substantial harm to other parties; and

(4) Where lies the public interest.

In re Complaint of Northeast Ohio Public Energy v. Ohio Edison Company, et al., Case No. 09-423-EL-CSS, Entry (July 8, 2009) at ¶6 citing *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (Feb. 20, 2003) at 5; *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Entry (Mar. 30, 2009) at 3.

B. Summary of the Pleadings

1. NEP'S MOTION FOR A STAY AND EXPEDITED RULING

{¶ 11} In its motion for a stay and expedited ruling, NEP argues that a stay is warranted because AEP Ohio has unilaterally changed its policy to begin denying construction requests at buildings such as the Apartment Complexes. NEP alleges that such requests have been routinely granted for over 20 years but that they are now being denied based solely upon NEP being the requesting construction service provider. NEP contends that AEP Ohio has implemented this policy without any Commission order that NEP or the property owners are, or will be, violating any law or tariff provision. NEP again asserts that

it does not distribute or supply electricity, but merely acts as a coordinator and service provider for infrastructure at multi-family housing complexes.

{¶ 12} With respect to the four factors used by the Commission to determine if a stay is warranted, NEP believes that it satisfies each factor. First, NEP asserts that it is likely to prevail on the merits. NEP asserts that it cannot be held to be a public utility or electric supplier to the Apartment Complexes, as it is undisputed AEP Ohio currently supplies electricity to all five buildings. Further, NEP points out that customer accounts for each of the Apartment Complexes are in the name of the landlord, not NEP. According to NEP, it is black letter law that landlords can submeter electricity to tenants. NEP contends that the complaint fails to set forth any facts indicating that NEP either supplies or purchases electricity that it can then supply to others.

{¶ 13} As to the second factor, NEP states that it will suffer irreparable harm absent a stay. NEP claims that the denial of work requests at the Apartment Complexes has stopped any planned construction and is now jeopardizing NEP's contracts and business opportunities. NEP warns that these stoppages not only threaten NEP's entire business model, but that, if they continue, then the company might no longer be able to continue full engagement of its employees. NEP argues that such harm should not be allowed to occur simply because AEP Ohio initiated a complaint. According to NEP, AEP Ohio should have a Commission order or finding validating its new policy before being permitted to jeopardize a business that has relied on AEP Ohio's prior application of its tariff for over 20 years. Further, NEP believes that no monetary restitution is possible for the harm that will occur to it. NEP believes that it is being deprived not only of contractual rights to serve the property owners at the Apartment Complexes, but that AEP Ohio's new policy places its entire business in jeopardy.

{¶ 14} As to the third factor, NEP argues that granting the requested stay will cause no new or additional harm to the parties. NEP stresses that it is simply seeking to reestablish the status quo that has been in place for over 20 years with regard to how NEP sought and

AEP Ohio approved construction work requests. With that object, NEP asserts that no third parties will be negatively impacted, and, in NEP's estimation, the five Apartment Complex owners will actually benefit by receiving the services they bargained for with NEP. In NEP's estimation, the only entity that will be harmed if the stay is not granted are the five Apartment Complex owners, as they will be denied their right to choose the infrastructure that exists on their own property.

{¶ 15} Finally, NEP believes that the public interest favors granting the stay and continuing a practice that has been ongoing for decades. NEP again states that Ohio law favors allowing landlords to submeter tenants. NEP argues that the Supreme Court decision in *Wingo* did not change the law, it simply rejected the modified *Shroyer* test and required the Commission to determine whether it has jurisdiction based upon the jurisdictional statute. According to NEP, the *Shroyer* test remains and the law dictates that landlords can still submeter tenants. NEP further argues that there is a public interest in open markets in which parties are able to freely contract to enter into agreements most beneficial to their interests. NEP stresses that the public interest favors not allowing a public utility to supplant the legal determination of this Commission. NEP believes that AEP Ohio is attempting to unilaterally change a 22-year interpretation of its approved tariffs, prior to consulting with the Commission. Furthermore, according to NEP, this new policy is being implemented in a discriminatory manner by AEP Ohio only applying it to NEP. NEP avers that AEP Ohio is not authorized to take this action, after doing the opposite for decades, without a Commission finding and order sanctioning such action.

{¶ 16} In summary, NEP seeks to reestablish the status quo that it believes AEP Ohio disrupted when it denied NEP's construction work orders at the Apartment Complexes. Enforcement of this new policy prior to a determination by the Commission as to its legitimacy is, in NEP's estimation, unfair and will irreparably harm NEP. NEP, therefore, requests a grant of its motion for a stay on an expedited basis and asks that the stay remain in place until the Commission issues an order on AEP's claims outlined in the complaint.

2. AEP OHIO'S AND OCC'S MEMORANDA CONTRA

{¶ 17} Both AEP Ohio and OCC filed memoranda contra NEP's motion for a stay, each requesting that the Commission deny the motion. To refute a number of claims made in NEP's motion, AEP Ohio attached to its memorandum an affidavit from Angie M. Rybalt, Director of Customer Experience at AEP Ohio.

{¶ 18} In its memorandum, AEP Ohio first asserts that NEP's motion consists of several factual inaccuracies and that AEP Ohio intends to set the record straight. AEP Ohio notes that it has objected to submetering before the Commission on multiple occasions but still followed then-Commission precedent concerning submetering. Based on this precedent, AEP Ohio agreed to provide master-metered service and permit submetering in (a) existing multifamily buildings that were already being submetered and (b) newly constructed multifamily buildings where AEP Ohio was establishing service for the first time. Also, AEP Ohio granted requests from third-party submetering companies, such as NEP, to reconfigure AEP Ohio's equipment and provide master-metered service to (c) existing multifamily building where AEP Ohio had been serving tenants directly.

{¶ 19} AEP Ohio believes that *Wingo* reopened the question as to whether NEP is a public utility and whether it is operating unlawfully under the Certified Territory Act and other statutes and regulations. And, shortly after the remanded *Wingo* case was dismissed, AEP Ohio brought this complaint to ask the Commission to complete the analysis under Supreme Court guidance and determine if NEP is a public utility. In the meantime, while the complaint is pending, AEP Ohio asserts that it has adopted the practice of preserving the status quo for tenants of multifamily buildings, meaning AEP Ohio is continuing to provide master-metered service without interruption to (a) existing buildings that are already submetered, including 164 NEP buildings in AEP Ohio's service territory and (b) going forward with requests to install master-metered service to facilitate submetering in newly constructed buildings where AEP Ohio is establishing service for the first time. According to AEP Ohio, NEP's claim that AEP Ohio has placed all NEP work orders on hold

as of September 28, 2021, is false since AEP Ohio is going forward with NEP's construction requests for eight new multifamily buildings where NEP plans to submeter and serve tenants. AEP Ohio believes a gap in the law was created regarding scenario (c) above such that, where AEP Ohio currently provides electrical service directly to the tenants of a multifamily building, AEP Ohio plans to continue to do so until the legal status of third-party submetering companies is resolved; this merely preserves the status quo for tenants pending resolution of the complaint. To clarify, AEP Ohio notes that it is applying this practice to all multifamily buildings where AEP Ohio currently serves the tenants directly. NEP's requests to convert the Apartment Complexes are the only pending requests that AEP Ohio has received from any third-party submetering company to "convert" a building to submetering where AEP Ohio currently services the tenants directly; therefore, AEP Ohio is not singling out NEP since it would pursue the same practice if a request from another company was submitted.

{¶ 20} AEP Ohio asserts that NEP's motion is procedurally improper in that the request asks for a hurried ruling in its favor and an injunction that grants NEP all the relief it seeks. According to AEP Ohio, it brought its complaint to prevent precisely NEP's requested outcome; therefore, such relief should only be decided after a full hearing. Furthermore, NEP has not cited to any statute or rule that permits the Commission to grant such relief, noting that the Commission's complaint procedures contemplate a motion to dismiss, but they do not contemplate allowing the Commission to order a public utility to abandon its existing service to customers, at least without a full hearing.

{¶ 21} Turning to the factors, both AEP Ohio and OCC assert that NEP has not demonstrated a likelihood of success on the merits. AEP Ohio believes that the Commission should not jump to conclusions or attempt to adjudicate these important issues based on a mere one page of reasoning in a procedurally suspect motion, and the Commission should preserve the status quo, as defined by AEP Ohio and described above. Regardless, AEP Ohio argues, and OCC similarly argues, NEP's arguments on the merits are spurious, asserting that submetering by third-party companies like NEP is not black letter law after

the *Wingo* decision. Further, the Supreme Court of Ohio made clear that previous cases addressing submetering only concerned situations inapposite to the subject case, which is the very reason the Court remanded the *Wingo* case back to the Commission; therefore, an examination on the merits is needed to determine the questions posed by the Supreme Court of Ohio, not a dismissal or stay.

{¶ 22} With regard to the second factor, both AEP Ohio and OCC assert that NEP fails to substantiate any harm to itself without preliminary relief. According to AEP Ohio, NEP's alleged concerns regarding maintaining employees are unfounded since the affidavit attached to NEP's motion provides scant evidence supporting such claims, noting that the motion does not explain how many employees are at issue or how many other NEP projects these employees may be working on; NEP also does not allege that it has or will lay off any employees. Furthermore, the affidavit does not substantiate actual harm to NEP, just a "concern" for the employees. Also, AEP Ohio argues that NEP does not substantiate its claims that it is being denied the benefit of certain contractual rights; that granting such a stay would only be temporary if the Commission would find in favor of AEP Ohio's complaint; that it does not make sense for AEP Ohio to expend money to convert to master-metered service until the Commission makes a final ruling; and, that NEP's allegations of harm are undermined by the limited nature of the dispute over the Apartment Complexes. To this last point, AEP Ohio asserts that NEP's claim that its entire business is in jeopardy is hyperbolic and unsupported. To the contrary, AEP Ohio notes that NEP still is operating at 164 buildings in AEP Ohio's territory, and AEP Ohio is going forward with NEP's requests to install master-metered service in new buildings. OCC similarly argues that NEP's claims regarding the complaint jeopardizing its entire business model are overblown in that NEP's affidavit, as well as its website, specifically state that it operates in several states outside of Ohio. In response to NEP's claim that it was blindsided by AEP Ohio's complaint, OCC notes that, due to prior consumer complaints, a prior Commission investigation into submetering, and the most recent decision in *Wingo*, NEP should have

been on notice of potential litigation for years, and it is disingenuous to say otherwise. Therefore, both AEP Ohio and OCC assert that NEP's motion fails the second factor.

{¶ 23} With regard to the third factor, AEP Ohio argues that granting NEP's motion would harm AEP Ohio, and both AEP Ohio and OCC assert that granting the stay would harm customers. Both AEP Ohio and OCC argue that requiring AEP Ohio to go forward with reconfiguring the Apartment Complexes for master-metered service would harm those customers, as they would lose protections from statutes, Commission regulations, and precedent. AEP Ohio believes granting the stay would also harm its business in that such a decision would violate AEP Ohio's exclusive right to provide distribution service to all customers within its service territory. Instead, AEP Ohio asks the Commission to preserve the status quo for tenants by denying the motion to stay and by not requiring any changes to the electric service at the Apartment Complexes pending resolution of the complaint. OCC adds that NEP's reliance on AEP Ohio's past allowance of master-metered service arrangements at multi-family properties is irrelevant following the *Wingo* decision.

{¶ 24} With regard to the fourth factor, OCC asserts that it is in the public interest to maintain the regulatory protections for electric rates and service that the tenants at the Apartment Complexes currently possess. Moreover, public interest demands that consumer access to essential and potentially life-saving electric utility service be protected, particularly as the winter months approach. OCC also believes that NEP is providing utility services, as contemplated by Ohio law, and doing so is in violation of the law and against public interest. Therefore, OCC concludes that the Commission deny NEP's motion for stay.

{¶ 25} AEP Ohio concludes by asserting that that NEP's motion for stay further proves that this case is ripe and should be adjudicated before the Commission. AEP Ohio notes that, after the complaint was filed in this case, NEP filed a civil action against AEP Ohio in the Franklin County Court of Common Pleas over the same Apartment Complexes and premised on the same facts at issue here; however, the court dismissed the suit, noting that the claims required the expertise of the Commission and are solely within the

Commission's jurisdiction. *See Civil Case*. AEP Ohio further notes that, if the complaint is unripe, so too is the motion to stay; NEP cannot argue on one hand that the complaint is unripe and then, on the other, argue that NEP needs affirmative relief from AEP Ohio's actions. Consequently, AEP Ohio requests that the Commission deny NEP's motion to stay.

C. Discussion

{¶ 26} The attorney examiner recognizes and agrees with AEP Ohio's contention that the Supreme Court's reversal of the *Wingo* decision necessitates a reconsideration of the status of third-party submetering companies such as NEP. All parties in this case advance their interpretations as to the consequence of the *Wingo* decision, but the reality is that while the Supreme Court rejected the modified *Shroyer* test, it did not opine as to whether NEP or other similar entities are operating as public utilities or state the test to be applied in such an analysis. Rather, the Court remanded the case back to the Commission to answer the jurisdictional question based upon the jurisdictional statute. The application of the Supreme Court's guidance and its ultimate effect upon submetering companies, public utilities, and Commission-approved tariffs is a determination that can be made only by the Commission. As no such analysis and determination has yet been made by the Commission, the attorney examiner agrees with NEP that it is inappropriate for AEP Ohio to unilaterally alter the interpretation and implementation of its Commission-approved tariffs relating to master-metered service. While NEP's assertion of a discriminatory application of this policy by AEP Ohio appears to be unfounded, the attorney examiner agrees that such action should not be taken without Commission consultation. Based upon this and applying the four-factor test for a stay in Commission proceedings, the attorney examiner finds that NEP's motion for a stay to maintain the status quo regarding master-metered service and AEP Ohio's implementation of its tariff is warranted.

{¶ 27} In applying the four-factor test, the attorney examiner first acknowledges that the motion to dismiss filed by NEP is pending but notes that any determination in this Entry as to any of the four factors is not dispositive as to the motion to dismiss. With regard to

the first factor, determining the likelihood of prevailing on the merits at such an early stage in a proceeding is a nebulous undertaking. While no new analysis of third-party submetering companies has been performed since the remand of the *Wingo* case, it is significant that NEP has operated in the same capacity for two decades and the Commission has never deemed it to be operating as a public utility. The burden in this case remains on AEP Ohio to show that NEP is operating as a public utility and violating the Certified Territory Act and other related statutes and regulations. Until such evidence is provided by AEP Ohio and the Commission officially makes such a determination, the attorney examiner finds that the first factor weighs in favor of NEP.

{¶ 28} With regard to the second factor, the attorney examiner finds that NEP has demonstrated irreparable harm absent the stay being granted. According to NEP, due to AEP Ohio's refusal to process the construction work requests for the Apartment Complexes, NEP cannot refigure the complexes. Consequently, NEP's ability to complete the existing five construction projects has been stalled, harming its reputation since it cannot fulfill its contractual obligations. Considering AEP Ohio's stance on the matter, NEP's ability to seek new business is being harmed in that it may lose access to potential new customers and construction work. Furthermore, NEP stresses that it may not be able to employ or maintain employees due to AEP Ohio's refusal to process the construction requests. Finally, NEP asserts that it is being deprived of the bargained-for contractual rights to serve the property owners of the Apartment Complexes. Considering NEP's representations above and taking into account that AEP Ohio has stopped following its tariff prior to Commission order saying otherwise, the attorney examiner finds that NEP has sufficiently demonstrated it will suffer irreparable harm absent a stay being granted.

{¶ 29} With regard to the third factor, the attorney examiner finds that granting the stay would not cause substantial harm to other parties. NEP's stay requests that the status quo, namely AEP Ohio processing master-metered service construction requests submitted by NEP at existing multifamily buildings where AEP Ohio had been serving tenants directly, be kept in place until a Commission order directing otherwise is issued. AEP Ohio

and OCC argue that AEP Ohio's customers at the Apartment Complexes would lose the protections afforded to customers of a public utility under statutes, Commission regulations, and precedent, resulting in substantial harm to these customers. The attorney examiner finds AEP Ohio's and OCC's arguments centered on customer protection unpersuasive. NEP is quite correct in that such arguments ignore the prior two decades of AEP Ohio allowing master-metered service, such as the services contemplated at the Apartment Complexes, in line with AEP Ohio's tariff and Commission precedent. Despite the Supreme Court's remand of the *Wingo* case, the Commission has not issued an order declaring that NEP qualifies as a public utility, and under such circumstances, the status quo remains, meaning no new or additional harm would befall customers of the Apartment Complexes if the stay were granted. AEP Ohio argues that granting the stay would harm its business since such a decision would violate AEP Ohio's exclusive right to provide distribution service to all customers within its service territory. Again, no such decision has been made by the Commission regarding NEP's status as a public utility; therefore, no violation of this exclusive right can be found at this time.

{¶ 30} With regard to the fourth factor, the attorney examiner finds that the public interest lies in favor of NEP. Other than claiming that its practice is not discriminatory, AEP Ohio does not directly address this fourth prong in its memorandum contra. OCC advances an argument similar to that provided for the third factor in that public interest lies with public utility customers possessing the rights and protections afforded by Ohio's regulatory law. Again, as noted above, despite the Supreme Court's remand of the *Wingo* case, the Commission has not issued an order declaring that NEP qualifies as a public utility, and under such circumstances, the status quo remains. The attorney examiner finds that, at this time, the public interest lies in granting the stay.

{¶ 31} In conclusion, the attorney examiner finds that NEP's motion for a stay is reasonable and should be granted. The attorney examiner further directs that the status quo be maintained and that AEP Ohio continue to follow its tariff and past practices regarding

master-metered services during the pendency of this case or until the Commission issues an order directing otherwise.

{¶ 32} The attorney examiner stresses that nothing in this Entry should be construed as indicating how the attorney examiner or the Commission will rule with respect to any motions still pending or any decision on the merits of the case. Any future rulings will be made by applying the applicable law to the facts presented and, except as required by law or Commission precedent, may be independent of any determinations made in this Entry.

IV. ORDER

{¶ 33} It is, therefore,

{¶ 34} ORDERED, That NEP's motion for a stay be granted and that AEP Ohio continue to follow its tariff and past practices regarding master-metered services during the pendency of this case or until the Commission issues an order directing otherwise. It is, further,

{¶ 35} ORDERED, That a copy of this Entry be served upon all interested persons and parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/David M. Hicks

By: David M. Hicks
Attorney Examiner

GAP/kck

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Case No(s). 21-0990-EL-CSS

Summary: Attorney Examiner Entry granting NEP's motion for a stay and ordering that AEP Ohio continue to follow its tariff and past practices regarding master-metered services during the pendency of this case or until the Commission issues an order directing otherwise. electronically filed by Kelli C. King on behalf of David M. Hicks, Attorney Examiner, Public Utilities Commission of Ohio

Summary: Notice Appeal electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company