BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

NATIONWIDE ENERGY PARTNERS, LLC'S MEMORANDUM CONTRA OHIO POWER COMPANY'S APPLICATION FOR REHEARING OF THE COMMISSION'S JULY 27, 2022 ENTRY AFFIRMING THE ATTORNEY EXAMINER'S "STAY" ORDER

TABLE OF CONTENTS

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Pursuant to Ohio Administrative Code 4901-1-35(B), Respondent Nationwide Energy Partners, LLC ("NEP") hereby files this Memorandum Contra Ohio Power Company's ("AEP Ohio") Application for Rehearing of the Commission's July 27, 2022 Entry Affirming the Attorney Examiner's "Stay" Order (the "Entry").

I. INTRODUCTION

The Commission should deny AEP Ohio's application for rehearing. AEP Ohio's application for rehearing attacks the Commission's Entry affirming the Attorney Examiner's December 28, 2021 grant of NEP's motion to stay the status quo while this case was pending. AEP Ohio threatens that it will appeal to the Supreme Court of Ohio. Yet, substantively, AEP Ohio's arguments are a regurgitation of its interlocutory appeal arguments that were rejected by the Attorney Examiner and Commission.

Motions to stay the status quo while cases are pending are regularly considered by the Commission under the authority set forth in R.C. 4901.18. *In re the Complaint of Citizens Against Clear Cutting, et al.*, Case No. 17-2344-EL-CSS, 2018 Ohio PUC LEXIS 254, *7 (Mar. 8, 2018) (hereinafter, "*Clear Cutting*"). Nothing AEP Ohio raises should alter the Commission's Entry. Contrary to AEP Ohio's view that it and not the Commission can determine if an entity is operating as public utility, the Entry reinforced that it is the Commission who will make that determination. It would therefore be inappropriate for AEP Ohio to unilaterally alter its tariff and past practices regarding master-metered services during the pendency of the case or until the Commission issues an order directing otherwise. The Attorney Examiner's December 28, 2021 decision and the Commission's Entry maintains the status quo. It continues the practice that existed for 22 years

prior to AEP Ohio's unilateral decision to stop processing construction work order requests for master-meter reconfiguration at multi-family properties. And, the stay prevents irreparable harm upon NEP. AEP Ohio's application for rehearing should be denied.

II. ARGUMENT

A party or affected corporation may file an application for rehearing within thirty (30) days after issuance of a Commission order. O.A.C. 4901-1-35; R.C. 4903.10. The application must set forth the ground(s) upon which the applicant considers the commission order to be "unreasonable or unlawful." *Id.* Nothing in AEP Ohio's application for rehearing establishes that the Commission's determinations were unreasonable or unlawful. To the contrary, Commission's Entry was reasonable and lawful.

Additionally, throughout the entirety of its application for rehearing, AEP Ohio once again attempts to transform NEP's motion to stay into a preliminary injunction. This is improper. AEP Ohio cites no Commission case law, or other relevant statute or law, to support this transformation. NEP will respond to AEP Ohio's application for rehearing and refer to the motion to stay that was filed, granted by the Attorney Examiner, and affirmed by the Commission.

A. RESPONSE TO ASSIGNMENT OF ERROR NO. 1: The Commission is Statutorily Authorized to Grant a Motion to Stay the Status Quo.

AEP Ohio seeks to upend the Commission's statutory authority set forth in R.C. 4905.04. This argument is without merit.

The Commission has been granted broad authority by the legislature. "The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission. [The Ohio Supreme Court] has recognized this legislative mandate." *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 150-151, 573 N.E.2d 655 (1991). Further,

"it is readily apparent that the General Assembly has provided for commission oversight of filed tariffs." *Id.* at 151. Indeed, "* * * The General Assembly has enacted an entire chapter of the Revised Code dealing with public utilities, requiring, *inter alia*, adequate service, and providing for permissible rates and review procedure. *E.g.*, R.C. 4905.04, 4905.06, 4905.22, 4905.231 and 4905.381." *Id.* at 152, quoting *State ex rel. Northern Ohio Tel. Co., v. Winter*, 23 Ohio St.2d 6, 9, 260 N.E.2d 827, 829 (1970). As set forth by the Commission, "R.C. 4905.04 vests this Commission with the power and jurisdiction to supervise and regulate public utilities and to require all public utilities to furnish their products and render all services exacted by the Commission or by law." Entry at ¶ 40; *see also* R.C. 4905.04. The grant of a motion to stay is consistent with the authority of R.C. 4905.04. *Id.*

The Commission should reject AEP Ohio's suggestion to alter or revise the statutory language of R.C. 4905.04. AEP Ohio merely recites statutory interpretation of case law and other sections of Chapter 4905 that do not directly address motions to stay. The Commission should not rewrite its statutory powers, simply because AEP Ohio does not like the result of the Entry.

AEP Ohio also fails to distinguish the Commission's regular use of its authority to provide assistance during the pendency of an action, including a stay of an activity. *Clear Cutting*, 2018 Ohio PUC LEXIS 254, *7 ("The Commission finds that the attorney examiner's ruling granting the stay against clear cutting in the November 16, 2017 Entry should be affirmed in all respects"); *In re the Complaint of the Northeast Ohio Public Energy, Council v. Ohio Edison Company and The Cleveland Electric Illuminating Company*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, *11 (July 8, 2009) (granting motion for a stay, notwithstanding the terms of FirstEnergy's supplier coordination tariff, it was prohibited from assessing switching fees with respect to any customer accounts associated with the NOPEC aggregation during the pendency of the

proceeding).[1] As in the cases cited, NEP sought a motion to stay an activity. In this instance the stay was to preserve the status quo established over the prior 22 years of past practice between NEP and AEP Ohio, and to prevent AEP Ohio from establishing a new process—without Commission authority—to reject a request for reconfiguration of master-meter services. This is plainly permitted under the Commission's broad authority and in line with its precedent. Thus, the Commission should deny AEP Ohio's first assignment of error.

B. RESPONSE TO ASSIGNMENT OF ERROR NO. 2: The Attorney Examiner is Similarly Authorized to Grant a Motion to Stay the Status Quo.

As with AEP Ohio's first assignment of error, AEP Ohio's second assignment of error should be denied.

Ignoring the prior 20 years of past performance, AEP Ohio created a new process without Commission authority when it unilaterally determined to reject requests for reconfiguration of master-meter services. NEP filed a motion to stay the status quo to require AEP Ohio to continue its past practices under its tariff. The Attorney Examiner granted NEP's motion to stay the status quo.

The grant of a motion to stay is not unusual or outside the Attorney Examiner's abilities. The Commission held that "R.C. 4901.18 specifically authorizes the Commission to appoint attorney examiners, and we have set forth the duties and authority of attorney examiners in Ohio

[1] *See also In re Complaint of Karl Friedrich Jentgen, et al. v. Ohio Edison Company and American Transmission Systems, Inc.*, Case No. 15-245-EL-CSS, Entry at ¶ 3 (Feb. 11, 2015) (granting complainants' request to temporarily stay removal of vegetation within the right of way pending attorney examiner's review of the immediate need for removal of vegetation); *In re Complaint of Joseph Grossi v. Duke Energy Ohio, Inc.*, Case No. 17-2126-EL-CSS, Entry at ¶ 3 (Oct. 31, 2017) (granting complainant's motion to stay of implementation of vegetation management plan); *In re Carbo Forge, Inc., et al.*, Case No. 14-1610-EL-CSS, 2016 Ohio PUC LEXIS 4, *13 (Jan. 6, 2016) (granting motion to stay termination of service on the basis of the amounts disputed in this case until otherwise ordered by the Commission, the legal director, or an attorney examiner); *In re City of Toledo v. FirstEnergy Solutions Corp.* Case No. 14-1944-EL-CSS, 2016 Ohio PUC LEXIS 23, *12-13 (Jan. 6, 2016) (same); *In re the Complaint of Central Ohio Technical College, et al.*, Case No. 15-455-EL-CSS, 2015 Ohio PUC LEXIS 185, *2 (Mar. 4, 2015) (granting motion to stay termination of service until otherwise ordered by the Commission, the legal director, or an attorney examiner).

Adm.Code 4901-1-27." Entry at ¶ 40. Under that rule, "the Commission has authorized, pursuant to Ohio Adm.Code 4901-1-27(B)(7)(d), attorney examiners to take such actions as are necessary to assure that the hearing proceeds in an orderly and expeditions manner." *Id.*, citing *Clear Cutting*, Entry (Mar. 8, 2018) at ¶ 18.

Through motion practice, the Commission has the authority to provide assistance during the pendency of an action, including a stay of an activity. *See, e.g.*, O.A.C. 4901-9-01(E) and 4901-1-12. And, the Commission has used such authority regularly in the past. *See, e.g., Clear Cutting*, 2018 Ohio PUC LEXIS 254 at *38; *In re the Complaint of the Northeast Ohio Public Energy*, 2009 Ohio PUC LEXIS 481 at *11; *see also, supra,* Footnote 1.

As established over the years of similar motions to stay and authorized under the Commission's statutes and promulgated rules, the Attorney Examiner was well within the authority of an attorney examiner in granting NEP's stay, and the Commission similarly violates no statute in upholding NEP's stay of the status quo. Contrary to AEP Ohio's claims, a stay is a proper request during the pendency of an action to maintain the status quo between a utility, its customers (the five complex owners) and the customers' contractor (NEP). AEP Ohio's second assignment of error must be denied.

C. RESPONSE TO ASSIGNMENT OF ERROR NO. 3: The Commission Complied with its Statutory Duties in Drafting the Written Entry.

AEP Ohio misrepresents the Commission's written Entry and the Commission's diligence. AEP Ohio falsely represents that the Commission failed to comply with R.C. 4903.09. However, an even fleeting review of the Entry evidences the Commission's compliance with its statutory authority. AEP Ohio's exaggerated assertions of non-compliance and insults regarding the Commission's efforts should be ignored, and the Commission should deny AEP Ohio's third assignment of error.

The Commission's Entry is not a "rubber stamp" as AEP Ohio suggests. Over five (5) pages (Entry at p. 8-12) the Commission meticulously examines AEP Ohio's arguments in its interlocutory appeal. The Commission completed the same examination of NEP's arguments on pages 12-16 of the Entry. It is only after the examination of the arguments on the four-factor test for granting a stay that the Commission determined that it agreed with the Attorney Examiner's analysis. Entry at ¶ 42. Indeed, this same type of analysis was completed in the denial of interlocutory appeal and affirmation of the motion to stay in *Clear Cutting*. 2018 Ohio PUC LEXIS 254 at *7 ("The Commission finds that the attorney examiner's ruling granting the stay against clear cutting in the November 16, 2017 Entry should be affirmed in all respects.")

AEP Ohio's unfair accusations against the Commission ignore the clear language and analysis set forth within the Entry itself. Thus, the Commission should reject and deny AEP Ohio's third assignment of error.[2]

D. RESPONSE TO ASSIGNMENT OF ERROR NO. 4: The Entry Properly Affirmed the Stay Under the Four Prong Test.

The Entry properly analyzed and affirmed NEP's motion to stay preserving the status quo under the Commission's well-established four-factor test. In determining whether to grant a motion to stay, the Commission considers:

> [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 the Northeast Ohio Public Energy, 2009 Ohio PUC LEXIS 481 at *2-3, citing *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI,

[2] AEP Ohio suggests that the Commission should have consolidated NEP's motion to stay with the "hearing on the merits." AEP Ohio Memo in Supp. App. Rehear. at p. 10. Over NEP's objection the evidentiary hearing was reset from August 23, 2022 to the week of October 24, 2022.

Entry on Rehearing, (February 20, 2003) at 5; *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Entry (March 30, 2009) at 3; *see also Clear Cutting*, 2018 Ohio PUC LEXIS 254 at *5, citing *MCI Telecommunications v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (1987).

AEP Ohio's continued attempts to color NEP's motion to stay as something different and AEP Ohio's use of other non-applicable standards is incorrect. Despite AEP Ohio's repeated assertions otherwise, the motion to stay standard does not require, as AEP Ohio suggests, overcoming a substantial burden to show likelihood of success or irreparable harm by clear and convincing evidence. *See supra.* Indeed, AEP Ohio has previously recognized in these proceedings and prior proceedings that this is not the standard for a motion to stay. NEP initially raised the standard in its December 10, 2021 motion for stay filing. In AEP Ohio's memorandum contra, AEP Ohio did not assert that NEP raised the wrong standard, that NEP was required to establish the factors by clear and convincing evidence, or that the Attorney Examiner's or Commission's long-standing use of motions to stay was improper. AEP Ohio opposed NEP's motion to stay on the basis that NEP "does not satisfy the four-part test the PUCO considers when presented with a motion to stay." AEP Ohio's Memo Contra (Dec. 17, 2021) at p. 2. AEP Ohio's prior adoption of the Commission's test on motions to stay can also be found in *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO. AEP Ohio's Memorandum Contra to the motion for stay in that proceeding again utilized the Commission's four-factor test governing a stay and applicable standards. *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Memo Contra Motion for Stay (Mar. 27, 2009) at p. 8 (referring to a "strong likelihood of success" standard). The Commission

should dismiss AEP Ohio's newly asserted criticisms of the Commission's motion to stay and its attempts to rewrite the standard.

Under the Commission's four-factor test, the Commission considered the parties' respective arguments, and affirmed the Attorney Examiner's findings.

1. AEP Ohio Improperly Attempts to Abandon the Commission's Motion to Stay Standard and, Under that Standard, NEP Made a Strong Showing that it is Likely to Prevail.

As an initial point, AEP Ohio intentionally misstates the Attorney Examiner's statement that determining the likelihood of success being a "nebulous undertaking" to try to diminish the Attorney Examiner's December 28, 2021 Entry. The Commission should ignore such tactics. AEP Ohio's cherry-picked language must instead be considered in the full context of the written decision. The immediate sentence prior provides that "any determination in this Entry as to any of the four factors is not dispositive as to the motion to dismiss." Dec. 28, 2021 Entry at ¶ 27. The Attorney Examiner clearly stated that its ruling on the stay should not be a remark on the ultimate issues before the Commission. Additionally, after the remark, the Attorney Examiner thoroughly sets forth analysis and finding that the first factor weighed in favor of NEP. *Id.*

With regard to the first factor, the standard requires and the Entry found that NEP made a "strong showing" that it is likely to prevail. *See, e.g.*, *In re Complaint of the Northeast Ohio Public Energy*, 2009 Ohio PUC LEXIS 481 at *2-3 (not referring to clear and convincing evidence); ***In re Columbus Southern Power Company and Ohio Power Company***, Case No. 08-917-EL-SSO, Entry at 3 (same); *Clear Cutting*, 2018 Ohio PUC LEXIS 254 at *5 (same). NEP has met that standard.

AEP Ohio attacks NEP's strong showing and, yet, AEP Ohio did not produce any evidence that NEP is a public utility. AEP Ohio did not even assert a plausible theory as to how NEP is "supplying" electricity within the meaning of the statute. This is especially true when AEP Ohio

continues to serve the five apartment complexes, either to the units or through master meters as of this date. Simply put, NEP cannot be held as a "public utility," "electric light company," or "electric supplier" to the five apartment complexes for electricity at issue in this action. AEP Ohio admitted in its complaint that it, **not NEP**, supplies electricity to the five apartment complexes. Complaint at ¶¶ 8, 31-35, 61-66. With master meters allowed under AEP Ohio's tariff as well as the provision of electricity by landlords to their tenants,[3] NEP's position is simple and easily articulated and AEP Ohio cannot provide any counterargument. That is the basis of NEP's strong showing of likelihood to succeed.

AEP Ohio also erroneously declares that the Commission and Attorney Examiner misinterpreted the *Wingo* decision. The Commission's interpretation is correct, not AEP Ohio's misguided self-serving representation of the impact of *Wingo* in order to disregard pre-*Wingo* precedent.[4] Nowhere in *Wingo* does the Supreme Court of Ohio overturn, vacate, or limit *Pledger* or *FirstEnergy* as AEP Ohio asserts. *Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617. As the Commission explained, the Supreme Court of Ohio simply rejected the "modified *Shroyer* test" that was used by the Commission in the *Wingo* proceeding, and required the "PUCO to determine whether it has jurisdiction based upon the jurisdictional statute[]", **an analysis that would be limited to the facts**

[3] *See* AEP Ohio's Tariff at Sheets Number 103-16 and 103-17 at Paragraph 21 ("in the case of an apartment house with a number of individual apartments the landlord shall have the choice of providing separate wiring for each apartment so that the Company may supply each apartment separately under the residential schedule, or of purchasing the entire service through a single meter under the appropriate general service schedule") and see Sheet 103-13 ("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, and the landlord owns the property upon which such resale or redistribution takes place."). This tariff language went into effect on November 17, 2021, but was unchanged from the prior tariff.

[4] AEP Ohio again only cites to *Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 2006-Ohio-2989, 849 N.E.2d 14 and *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485; yet, ignores *Jonas v. Swetland Co.*, 119 Ohio St. 12, 16-17, 162 N.E. 45 (1928) and *Shopping Centers Assn. v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 4, 208 N.E.2d 923 (1965).

in the *Wingo* complaint case. *Id.* at ¶ 26. The *Shroyer* test remains good law because the statutory definitions of a public utility are "are not self-applying when considered in the context of a landlord-tenant relationship." *Pledger*, 109 Ohio St. 3d at 465. Contrary to AEP Ohio's view and consistent with its stated position to allow existing master-metered properties to continue as is, the law remains that landlords can submeter tenants. *FirstEnergy*, 96 Ohio St.3d at 371-372, citing *Jonas*, 119 Ohio St. at 16-17; *Shopping Centers Assn.*, 3 Ohio St. 2d at 4.

What remains clear is that even though the Commission has not opined further on the practice of submetering or revisited the investigation proceeding in which the modified *Shroyer* test was adapted, the power to determine whether any entity is operating as a public utility rests with the Commission and **not** AEP Ohio. As set forth in the Entry, "[a]s no such analysis and determination has yet been made by the Commission as no case or controversy was before the Commission, the Commission agrees with the attorney examiner that it is inappropriate for AEP Ohio to unilaterally alter the interpretation of established practices under its Commission-approved tariffs relating to master-metered service." Entry at ¶ 39. AEP Ohio cannot unilaterally determine NEP's status and end the previous two decades of allowing multi-family properties to convert to master-meters. "Such action should be taken only after the Commission performs its own interpretation analysis and makes a determination on this issue." *Id.* Thus, the stay must remain in effect until resolution of this action.

The Entry recognizes that the ultimate decision in this proceeding remains one for the Commission—not AEP Ohio—and until the Commission makes a decision the first factor weighs in favor of NEP. *Id.*

2. AEP Ohio Again Improperly Attempts to Abandon the Commission's Motion to Stay Standard and, Under that Standard, Irreparable Harm Exists—AEP Ohio's Refusal to Process the Construction Work

Requests Stopped Construction and Jeopardized NEP's Contracts and Business Opportunities.

AEP Ohio again ignores the standard established in motion to stay case law. The standard does not require a burden to establish irreparable harm by clear and convincing evidence. *See, e.g.*, *In re Complaint of the Northeast Ohio Public Energy*, 2009 Ohio PUC LEXIS 481 at *2-3 (not referring to clear and convincing evidence); *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Entry at 3 (same); *Clear Cutting*, 2018 Ohio PUC LEXIS 254 at *5 (same). NEP presented evidence and, as affirmed by the Entry, has shown that NEP would suffer irreparable harm absent the stay being granted.

AEP Ohio took it upon itself, without Commission or Supreme Court of Ohio order, to determine NEP was a public utility and refused to process construction work order requests for reconfiguration. As previously set forth by NEP in briefing and its supporting affidavit, AEP Ohio's unilateral decision stalled the five construction projects and harmed NEP's reputation since it could not fulfill its contractual obligations. Moreover, without the stay, the construction at those sites cannot move forward, which not only places NEP's business model in jeopardy, but raises immediate concerns regarding employee welfare—including continued full engagement of its employees who complete and support these construction projects—due to AEP Ohio's denial of these five apartment complex construction work order requests based upon the change in policy. *See* NEP's Mtn. to Stay, Aff. Ringenbach at ¶¶ 14, 16. NEP cannot be any clearer—no construction work means no work for these employees.

Furthermore, without resubmitting NEP's arguments set forth in its motion to stay in full, it is important to consider that harm is irreparable when there is no plain, adequate and complete remedy at law for its occurrence, and when any attempt at monetary restitution would be impossible, difficult, or incomplete. *In re Complaint of the Northeast Ohio Public Energy*, 2009

Ohio PUC LEXIS 481 at *8-9 (citations omitted). Despite AEP Ohio's representations otherwise, the Entry considered NEP and AEP Ohio's arguments in full and still found irreparable harm. Entry at ¶¶ 8-16 (considering AEP Ohio interlocutory appeal and NEP's memorandum contra and arguments therein).

AEP Ohio seems too intent in ignoring the evidence and argument NEP submitted as to how it would be irreparably harmed if AEP Ohio is not stayed from blocking NEP. First, NEP's business is in jeopardy as its ability to complete the existing five construction projects and seek new business is being harmed. If NEP cannot complete these projects, NEP may lose access to potential new customers and construction work—reputational damage is being done with every day that NEP is unable to fulfill its contractual obligations. Without construction moving forward due to AEP Ohio's refusals, NEP's construction employees and support staff will be impacted absent sufficient work, and NEP may be forced to part with skilled, experienced and trained employees that it will be unlikely to be able to rehire after these proceedings conclude. Second, NEP is being deprived of the contractual rights to serve the property owners at the five apartment complexes, which it bargained for, and which rights are not by their nature monetarily compensable. This has been held to be an irreparable harm in other circumstances. *See, e.g.*, *Hill v. Washburne*, 953 F.3d 296, 309 (5th Cir. 2020) (finding irreparable harm where a party would be deprived of the benefit of its bargain).

Each of the above could separately be considered irreparable damage and together clearly sufficient for the Commission to affirm the Attorney Examiner's finding of irreparable harm—which the Entry properly does. Thus, the second factor is in favor of NEP's motion to stay.

3. The Stay Continues 22 Years of Practice by AEP Ohio—No New or Additional Harm Will Occur to Other Parties.

Neither the Commission nor the Attorney Examiner ignored harm to customers as AEP Ohio suggests. The real issue is that AEP Ohio continues to forget the history between the parties in its assertions of harm to other parties. As appropriately found in the Attorney Examiner's Entry and affirmed by the Commission, AEP Ohio's arguments that center on customer protection "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." Dec. 28, 2021 Entry at ¶ 29. AEP Ohio does this under its theory that *Wingo* vacated all prior precedent and permitted AEP Ohio the right to declare NEP a public utility. This is incorrect. As the Attorney Examiner's Entry provides, "[d]espite 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." Dec. 28, 2021 Entry at ¶ 29; *see also* Entry at ¶ 39 ("Absent relief granted in the Stay Entry, AEP Ohio would have unilaterally altered the interpretation and implementation of its tariff without Commission approval. The stay, therefore, was both appropriate and consistent with the Commission precedent."). Thus, the Commission properly denied AEP Ohio's interlocutory appeal and affirmed the Attorney Examiner's finding that granting the stay would not cause substantial harm to other parties.

4. The Public Interest Lies in Granting the Stay.

AEP Ohio essentially merges the third and fourth factors, thereby ignoring the separate considerations of public interest in granting the stay.

NEP's motion for stay identified multiple reasons why public interest favors granting the stay—i.e., the fact that the law allows landlords to submeter; prohibiting unfair and unreasonable business practices; the freedom to contract; and to prevent a public utility from supplanting the legal determination of the Commission. NEP's Mtn. for Stay at p. 9-10. These bases remain independent reason in support of NEP's motion to stay on the fourth factor. Moreover, public interest favors granting a stay and placing the parties back to the position they were in prior to AEP Ohio's decision to enact its prejudicial new policy, pending resolution of the claims in this case and a final Commission order. The Commission's Entry affirming the stay was appropriate and warranted.

5. The Entry Re-establishes the Status Quo with Regard to how NEP Sought and AEP Ohio Approved Construction Requests.

The status quo was not altered. The Entry re-established the status quo of the prior 22 years of tariff interpretation and application that AEP Ohio attempted to upset. That is the status quo that NEP seeks and the Entry upholds. It was AEP Ohio, not NEP, who upset that status quo without the Commission's approval by filing its Complaint beginning to deny service requests that its tariff obligates it to fulfill. It was AEP Ohio who upended the prior 22 years of practice allowing conversions to a master meter. AEP Ohio believes that because it refused to allow the five apartment complexes to be reconfigured to master-meter services the status quo would be to continue to prevent those complexes from being reconfigured. Or, in other words, the most recent action by a party should be maintained. This concept is flawed as it allows a single party to determine what the status quo is as of a single moment in time.

Further, AEP Ohio's assertion's regarding its tariff are not persuasive. So long as AEP Ohio's customers (the property owners) continue to want to convert to master-meters, AEP Ohio must complete the requested construction even if it prevails in this proceeding. *See, e.g.*, *In re*

Complaint of Michael E. Brooks, et al., v. The Toledo Edison Company, Case No. 94-1987-EL-CSS, Opinion and Order, p. 16 (May 8, 1996) ("Toledo Edison's power to prohibit or restrict electrical service between the landlord and tenants through the company's tariff must also end at the landlord's property line.").[5] The properties will remain master-metered and not revert to non-master meter service without the landlords' request. Indeed, AEP Ohio's tariff expressly provides that landlords can either utilize AEP Ohio residential service for individual units or take service through a single meter for the entire complex. *See* AEP Ohio's Tariff at Sheets Number 103-16 and 103-17 at Paragraph 21 ("in the case of an apartment house with a number of individual apartments the landlord shall have the choice of providing separate wiring for each apartment so that the Company may supply each apartment separately under the residential schedule, or of purchasing the entire service through a single meter under the appropriate general service schedule"). AEP Ohio's current tariff also expressly allows submetering. *See* Sheet 103-13 ("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, and the landlord owns the property upon which such resale or redistribution takes place."). Regardless of whether NEP is a "public utility," whether a landlord may receive master-metered service and whether that landlord may use NEP to maintain its infrastructure and administer its tenants' bills are completely separate issues.

AEP Ohio's current tariff (updated in November 2021) also states that "**[a] customer** cannot engage in resale of electricity if the resale would constitute the activities of an electric light company", and that resale will be permitted "from a landlord to a tenant where **the landlord** is not

[5] The Commission also noted in *Brooks* that "the only remedy provided by the tariff, termination of service . . . , renders this provision so unpracticable as to be unenforceable" and "[the utility] has no valid right or interest in attempting to prohibit or economically regulate such resale or redistribution" *In re Complaint of Michael E. Brooks, et al.*, Case No. 94-1987-EL-CSS, Opinion and Order at p. 16.

operating as a public utility" (emphasis added). AEP Ohio alleges that NEP will resell electricity (it will not) but does not allege that NEP is or will be its **customer**. Neither does AEP Ohio allege that NEP is the **landlord,** and AEP has made clear that it does not seek to have landlords who submeter deemed public utilities. Effectively then, AEP Ohio seeks to read-into its tariff the words "or a party with whom it contracts" following "customer" and "landlord" in the relevant tariff provision.

AEP Ohio should "follow its tariff" by reading it *as written*. If AEP Ohio believes that an entity other than its customer (the landlord) is acting as a public utility, the remedy cannot be to deny service that is available under its tariff to customers with whom it claims no quarrel. The remedy is to await the Commission's resolution of the issue.

III. CONCLUSION

AEP Ohio's application for rehearing should be denied. AEP Ohio, without any authority, took it upon itself to determine whether an entity is acting as a public utility – a role reserved to the Commission. It did so when denying the construction requests that NEP submitted on behalf of the apartment complex owners – only a few months after telling NEP that construction could proceed at the complexes and over nine months after the Supreme Court's decision in *Wingo*. The Attorney Examiner's decision, and the Commission's denial of AEP Ohio's interlocutory appeal, served to stay the status quo and was consistent with their case law and statutory authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on this 6th day of September, 2022 upon all persons listed below:

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/s/ Michael J. Settineri

Summary: Memorandum Contra Ohio Power Company's Application for Rehearing of the Commission's July 27, 2022 Entry Affirming the Attorney Examiner's "Stay" Order electronically filed by Mr. Michael J. Settineri on behalf of Nationwide Energy Partners, LLC