

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**OHIO POWER COMPANY’S MEMORANDUM CONTRA  
NATIONWIDE ENERGY PARTNERS, LLC’S  
MOTIONS TO STRIKE PORTIONS OF THE DIRECT TESTIMONY OF  
STEVEN D. LESSER, JAIME MAYHAN, AND JON WILLIAMS**

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**I. Introduction**

On October 17, 2022, Nationwide Energy Partners, LLC (“NEP”) filed three separate motions to strike portions of the prefiled testimony of Ohio Power Company (“AEP Ohio” or “the Company”) witnesses Steven D. Lesser, Jaime Mayhan, and Jon Williams. NEP’s motions raise a variety of arguments, challenging everything from Mr. Lesser’s purported “bias,” to the purported lack of foundation for various witness statements, to the relevance of testimony regarding the impacts of NEP’s service on the tenants of the apartment complexes NEP serves. For the reasons provided below, the Commission should deny the entirety of NEP’s motions. The challenged topics in the witnesses’ testimonies are all relevant to the core legal issue in this case – whether NEP is acting as a “public utility,” an “electric light company,” and an “electric distribution utility” under R.C. 4905.02, 4905.03, 4928.01, and 4933.83(A) – and are properly supported by the witnesses. If NEP wishes to challenge this testimony, it should do so in the regular fashion: through cross-examination and briefing.

## **II. The Commission Should Deny NEP's Motions to Strike Portions of AEP Ohio's Testimony.**

NEP identifies several portions of AEP Ohio's testimony that it asserts should be struck for various reasons, some on multiple grounds. As explained below, NEP's motions are not supported by Ohio law or Commission precedent and should be denied in their entirety.

### **A. Mr. Lesser's alleged "bias" is not grounds for striking his opinion.**

NEP begins its motion to strike Steven Lesser's testimony by arguing that the testimony "should be struck in its entirety" because Mr. Lesser is "biased" in favor of AEP Ohio. (NEP Motion to Strike Lesser Testimony at 4.) NEP notes that Mr. Lesser's law firm is representing Duke Energy Ohio, Inc. ("Duke") in a related complaint case (though Mr. Lesser is not, himself, involved in that other proceeding), and that "AEP Ohio and Duke have a joint defense agreement involving NEP," indicating that Duke and AEP Ohio share common legal interests. (*Id.* at 4-5.) Because his firm is representing Duke in that action, and AEP Ohio's success in this action could create precedent benefiting Duke, NEP asserts that Mr. Lesser is biased and his testimony must be struck. (*See id.* at 5.) NEP offers no citations to Ohio case law, however, or to prior Commission opinions, to support the proposition that alleged "bias" is grounds for striking otherwise admissible expert testimony.

The Commission should not be surprised that an expert witness's opinion is aligned with the party on whose behalf he is testifying. Similar to NEP's arguments here, the complainant in a 2007 complaint case against Cleveland Electric Illuminating ("CEI") argued that the Commission had violated the Ohio Rules of Evidence when it allowed CEI to present "a long-term CEI employee" as an expert rather than "an objective, independent expert." *In the Matter of the Complaint of Pro Se Commercial Properties v. The Cleveland Electric Illuminating Co.*, Case No. 07-1306-EL-CSS, Entry on Rehearing, ¶ 8 (Nov. 5, 2008). The Commission rejected

those complaints about the witness's lack of independence, responding: "[W]e would not anticipate CEI offering a witness to support complainant's assertions any more than we would expect complainant to offer a witness to support CEI's assertions." *Id.* at ¶ 9. In much the same way, NEP should not be surprised that AEP Ohio would offer a witness to support its own claims, rather than NEP's counterclaims.

The Commission can safely presume that Mr. Lesser – a long-time Attorney Examiner, Chief of Staff, and Commissioner (*see* Lesser Testimony at 1) – would not have agreed to submit testimony on behalf of AEP Ohio if he did not agree with AEP Ohio's position. That said, if NEP believes that Mr. Lesser's purported bias in favor of the company that retained him and is offering his testimony is an issue worth raising at hearing, it is free to do so on cross-examination, albeit within reason.<sup>1</sup> "Evidence of bias and pecuniary interest is a legitimate subject of inquiry of all expert witnesses within the limits imposed by the trial court in the reasonable exercise of its discretion." *Calderon v. Sharkey*, 70 Ohio St. 2d 218, 223-24, 436 N.E.2d 1008, 1012 (1982).

**B. The testimony of Mr. Lesser that NEP characterizes as "harm"-focused is relevant to the core legal issue before the Commission.**

NEP next argues that several large portions of Mr. Lesser's testimony "focus[ ] on various alleged 'harms' that befall customers when they switch to master-metered service, including, but not limited to loss of metering rights, percent of income [payment plan] program, other payment plans, easy to understand bills, [and] shopping \* \* \* ." (NEP Motion to Strike Lesser Testimony at 5-6.) NEP argues that "quantifying harm is not relevant in this

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<sup>1</sup> AEP Ohio would object, for example, to cross-examination questions designed to elicit information regarding Benesch, Friedlander, Coplan & Aronoff LLP's specific work on behalf of Duke; the legal advice provided by Benesch to Duke; or Mr. Lesser's privileged or protected communications with other Benesch counsel regarding the issues raised in this proceeding.

proceeding[,]” citing the Commission’s May 6, 2022, and July 27, 2022 entries in this case (*id.* at 6), and moves to strike dozens of pages of Mr. Lesser’s testimony.

As a threshold matter, this motion to strike large portions of Mr. Lesser’s testimony should fail for lack of specificity and explanation of how each of the passages relates to their “harm” theory. Most of the entries in NEP’s lengthy list of alleged “harm” discussions (*see id.* at 7) do not simply describe the loss of benefits or consumer protections for customers served by NEP. The first two entries in the list (pp. 19:16-23 and 20:1-18) are, in fact, Mr. Lesser’s opinion on why the Supreme Court of Ohio’s decision in *In re Complaint of Wingo v. Nationwide Energy Partners, LLC*, 163 Ohio St.3d 208, 2020-Ohio-5583 (“*Wingo*”), does *not* bar the Commission from considering the customer impacts of adopting NEP’s position in this action. The next two entries in the list (pp. 53:13 – 54:5 and 54:13-17) explain Mr. Lesser’s opinion that NEP’s adoption of metering standards supports his conclusion that NEP is “engaged in the business of supplying electricity.” Several lines down, pages 64 through 67 of Mr. Lesser’s testimony discuss the similarities between NEP’s bills and AEP Ohio’s bills, which support his opinion that NEP is “engaged in the business of supplying electricity” when it sends bills for electric service. (*See Lesser Testimony at 67:1-8.*) The next several entries, pages 72 through 75 of Mr. Lesser’s testimony, discuss why NEP’s offering of payment plans is additional evidence related to the statutory concepts that NEP is unquestionably “engaging in the business of supplying electricity and acting just like a Commission-regulated public utility \* \* \* .” (*Id.* at 74:20-22.) And the last entry in NEP’s list, pages 77 to 87 of Mr. Lesser’s testimony (Section H), describes how NEP’s disconnection practices and policies are “another striking way in which NEP is clearly acting as an independent, third-party electric distribution utility.” (*Id.* at 77:12-13.) Mr. Lesser does not address those matters to establish that NEP was already obligated to

follow utility regulations (or by extension had already violated such regulations); he addresses them to show that NEP impersonates an electric utility and engages in the business of supplying electricity to retail consumers (the controlling legal standard under R.C. 4905.03).

That said, the Commission has not held that the loss of consumer protections for tenants in apartment complexes served by NEP is irrelevant for all purposes. As explained in the Attorney Examiner's July 26, 2022 Entry, the Commission's May 6, 2022, and July 27, 2022 entries in this case were "limited to the narrow discovery issues presented within [NEP's] motion for protective order" and were not "intended to prejudge the relevance or admissibility of any testimony or other evidence that ha[d] not yet been presented to the Commission in this case." Entry ¶ 32 (July 26, 2022).

More importantly, as Mr. Lesser opines, nothing in the Supreme Court's decision in *Wingo* requires the Commission to ignore the interests of, and impact on, consumers. The Supreme Court in *Wingo* addressed a discrete question of whether the SSO price cap reflected in the modified *Shroyer* test was lawful. The Court determined that it was not, because the Commission cannot "write jurisdictional rules that go beyond the statutes defined by the General Assembly." *Wingo*, at ¶ 21. But that does not mean that the Commission is categorically precluded from considering customer interests, especially when applying the facts to the controlling statutory definition. The Commission can – and must – consider the entire factual context in applying the jurisdictional statute to the facts presented in this case. *See Wingo*, 2020-Ohio-5583, ¶ 26 ("The application of the relevant legal standards to the facts is one that is best left to the PUCO in the first instance."). As discussed below, R.C. 1.49 directs courts (and, by extension, the Commission) to consider the consequences of adopting NEP's legal position if the Commission finds that R.C. 4905.03 is ambiguous. And even if the Commission does not

consider customer interests in reaching the jurisdictional conclusion, it can do so in addressing the merits and/or remedy of what to order in this case. *See Wingo* at ¶ 23 (“whether someone is “harmed” ... is a merits question that can be answered only after it is determined that an activity falls within the PUCO’s jurisdiction”).

For all of these reasons, the Commission should deny NEP’s motion to strike the dozens of pages of Mr. Lesser’s testimony that NEP characterizes as discussing the harms to residential customers from NEP’s provision of service.<sup>2</sup>

**C. The portions of Mr. Lesser’s testimony that NEP characterizes as “legal analysis” provide the framework for his regulatory opinions.**

Mr. Lesser explained, in his testimony, that “the purpose of [his] testimony is not to provide legal opinions, and [he is] not representing AEP Ohio as an attorney in this matter.” (Lesser Testimony at 20:22-23.) Instead, he is “testifying as a regulatory expert based on [his] many years of experience as a Commissioner, as an Attorney Examiner, and in other positions at the Commission.” (*Id.* at 20:20-21.) And as AEP Ohio pointed out in its Motion to Strike, former Commissioner Centolella also endeavors to address a very similar and parallel set of points as former Commissioner Lesser. Nonetheless, Mr. Lesser further explains, his opinions “present [his] own understanding of – and assumptions about – the relevant statutes, regulations, and cases \* \* \* in order to lay the groundwork for the conclusions [he] ultimately reach[es] about NEP’s business model” and, specifically, “whether NEP is operating as an ‘electric light company’ and ‘public utility’ under Ohio law.” (*Id.* at 21:1-8.)

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<sup>2</sup> For the same reasons, the Commission should deny NEP’s motion to strike AEP Ohio witness Mayhan’s testimony noting that tenants in apartments served by NEP are not eligible for Ohio’s Percentage of Income Payment Plan (“PIPP”) program. (*See* NEP Motion to Strike Mayhan Testimony at 4-5.) The Commission should also deny NEP’s motion to strike AEP Ohio witness Williams’s testimony summarizing “the impact of severing the AEP Ohio’s relationship with residential tenants” (Williams Testimony at 10:6 – 12:6).

For example, on pages 18 and 19 of this testimony, Mr. Lesser notes that R.C. 1.49, which provides guidance to courts in construing ambiguous statutes, directs courts to consider (among other things) “[t]he object sought to be attained” by the Ohio Legislature when it enacted the statute, and “[t]he consequences of a particular construction” of the statute. (*Id.* at 18:1-15.) He then goes on to summarize why, in his opinion, considering the purpose of R.C. 4905.02 and R.C. 4905.03 support a conclusion that NEP is a “public utility” (*id.* at 18:16 – 19:2), and the consequences of reaching (or not reaching) such a conclusion (*id.* at 19:3-15). Mr. Lesser specifically notes that his discussion on the first point is background for Section III.A. of this testimony. (*Id.* at 18:16-17.) On the second point, Mr. Lesser discusses throughout his testimony the consequences to customers if the Commission concludes that NEP is not a public utility. (*See, e.g.*, 32:2-5, 54:3-18 (discussing customers’ loss of consumer protections).)

NEP disagrees, arguing that these portions of Mr. Lesser’s testimony somehow “go[ ] beyond the scope of his testimony” (a contradiction in terms) because they offer legal opinions. (*See* NEP Motion to Strike Lesser Testimony at 11.) In particular, NEP argues that pages 18 (lines 1 through 25), 19 (lines 1 through 15) are improper “legal analysis” because they discuss R.C. 1.49. (*Id.*) Similarly, NEP argues that pages 37 (lines 12-13) and 97 (lines 12 through 15) are improper because they comment on the development of common law. (*Id.*) But again, Mr. Lesser’s discussion of the relevant statutes is background for his opinion. And referencing the manner in which courts develop common law is not a legal opinion.

NEP further argues that Mr. Lesser’s discussion of R.C. is irrelevant because “the jurisdictional statutes – R.C. 4905.02 and R.C. 4905.03 – are [not] ambiguous.” (NEP Motion to Strike Lesser Testimony at 7.) NEP further notes Mr. Lesser’s opinion that the relevant statutory language is “clear and unambiguous.” (*Id.* at 7-8, quoting Lesser Testimony at 17.) But NEP

neglects to note what Mr. Lesser went on to say: that “[i]f \* \* \* the Commission determines that the statute is ambiguous in the situation presented here, then the Commission should look to the statutory rules of construction that the General Assembly has mandated for ambiguous statutes.” (Emphasis added.) (Lesser Testimony at 18:1-3.) And the Commission may very well find that R.C. 4905.03 is ambiguous. As the Supreme Court of Ohio commented in *Wingo*, “[t]he jurisdictional statute doesn’t directly address reselling,” and “interpreting the statute may involve some complexity \* \* \*.” *Wingo*, 2020-Ohio-5583, ¶ 25. At this stage of the proceedings, there is no way – and no need – to prejudge whether the Commission will find the statutory language ambiguous. What we do know at this stage is that the Supreme Court, as the highest legal authority in Ohio, was not willing to address the question as a purely legal question or one that they could unambiguously apply themselves. In reality, it is a mixed question of fact and law. Thus, Mr. Lesser’s testimony regarding the factors to be considered under R.C. 1.49 should not be stricken.

As an afterthought, NEP also asks the Commission to strike the discussion of the Commission proceedings that led to the *Wingo* decision on page 38 of Mr. Lesser’s testimony, arguing that “this historical background is irrelevant to the Commission’s inquiry \* \* \*.” (NEP Motion to Strike Lesser Testimony at 8-9.) The Supreme Court of Ohio seems to disagree, as it included a similar background in its own *Wingo* opinion. *See Wingo*, 2020-Ohio-5583, ¶¶ 3-6 and 10-14. AEP Ohio does not understand how the background of the *Wingo* decision could be considered irrelevant in a case in which the Commission must apply *Wingo* to resolve the central legal issue before it.

NEP also asks the Commission to strike portions of Mr. Lesser’s testimony because, NEP says, Mr. Lesser improperly speculates “on why the Supreme Court of Ohio or the Commission



made certain rulings.” (NEP Motion to Strike Lesser Testimony at 10.) In fact, the cited portions of Mr. Lesser’s testimony do not address any Commission rulings. Instead, Mr. Lesser is offering his interpretation of the Supreme Court of Ohio’s holdings in *Jonas v. Swetland Co.*, 119 Ohio St. 12 (1928), and *Wingo*. (See Lesser Testimony at 33:8-10, 36:2-6, 36:17-18, and 39:18-19.) This is not “speculation”; it is basic case analysis and necessary background for Mr. Lesser’s opinions. If NEP disagrees with Mr. Lesser’s interpretations, it can offer its own interpretations.

**D. Mr. Lesser’s testimony discussing the viewpoint of a prototypical tenant in a multi-family residential complex served by NEP is relevant to the central issue in this case.**

Next, NEP moves to strike large portions of Mr. Lesser’s testimony because it dislikes his use of a prototypical apartment renter as a framing device to offer his opinions.

As a means of illustrating his opinions regarding the way in which consumers might view NEP’s business practices, Mr. Lesser “discuss[es] a prototypical tenant, Jane[,]” who “lives in an apartment complex where AEP Ohio used to serve all tenants” but which “is being converted to submetering by NEP.” (Lesser Testimony at 42:6-9.) In particular, Mr. Lesser discusses whether NEP might appear to Jane to be “engaged in the business of supplying electricity” when it “installs its own equipment to serve customers” (*id.* at 47:1-7), “purchases electric distribution service at the master meter for resale” (*id.* at 51:3-16), “meters her electric usage” (*id.* at 53:7 – 54:18), “applies rates for electric service” (*id.* at 60:3 – 61:20), “sends her a bill for electric service” (*id.* at 67:1-8), “offers payment plans” (*id.* at 84:12 – 85:2), and “fields customer service calls and addresses customer questions and concerns” (*id.* at 89:11 – 90:19).

NEP asserts that these portions of Mr. Lesser’s testimony are “speculative” and should be struck. (See NEP Motion to Strike Lesser Testimony at 2, 9.) But Mr. Lesser is not speculating as to the opinions and mindset of a particular person – Jane does not exist. (See Lesser

Testimony at 42 (“For purposes of privacy, it is unnecessary to name or discuss any actual tenant.”). Mr. Lesser is using a rhetorical device to illustrate his points.<sup>3</sup>

NEP further argues that the “Jane” hypotheticals are inappropriate because they are being used “to demonstrate alleged harms that befall residential customers living in multi-family properties for which NEP acts as an agent.” (NEP Motion to Strike Lesser Testimony at 9.) As indicated above, and discussed further below, it is relevant under R.C. 1.49 to consider the consequences to tenants if the Commission concludes that NEP is not a public utility. But that is not “Jane’s” purpose. Again, Mr. Lesser is using “Jane” as a rhetorical device to illustrate the ways in which NEP appears to be “engaged in the business of supplying electricity” from the average tenant’s point of view. (*See, e.g.*, Lesser Testimony at 54:15-18 (“Although it is important for the Commission to understand how Jane’s metering rights will be limited when NEP takes over, the key point is NEP does impose a set of metering rules and practices, and in so doing is ‘engaged in the business of supplying electricity’”).

Whether NEP is engaged in the business of supplying electricity is the main issue in this case, and the “Jane” sections help illustrate Mr. Lesser’s opinion that NEP is, indeed, engaged in that business. That testimony is centrally relevant, and the Commission should deny NEP’s motion to strike those portions of Mr. Lesser’s testimony.

**E. NEP’s disagreement with Mr. Lesser’s assumptions or conclusions is not grounds for striking any portions of his testimony.**

NEP also moves to strike several other portions of Mr. Lesser’s testimony as “speculative.” (*See* NEP Motion to Strike at 9-10.) NEP argues that “Mr. Lesser has no

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<sup>3</sup> This specific rhetorical device is called dialogismus: “[s]peaking as someone else, either to bring in others’ points of view into one’s own speech, or to conduct a pseudo-dialog through taking up an opposing position with oneself” Dr. Gideon Burton, *Silva Rhetoricae*, Brigham Young University, <http://rhetoric.byu.edu/Figures/D/dialogismus.htm>.

specialized knowledge about NEP’s business” and, consequently, his testimony regarding NEP’s ability to change its rates without providing public notice and an opportunity to comment (*see* Lesser Testimony at 57:13-14), his description of NEP’s core business model (*see id.* at 62:15-21), and his description of NEP’s bills (*see id.* at pages 63-67 and 70) must be struck as speculative.

Some portions of this testimony are incontestable. For example, NEP witness Teresa Ringenbach describes NEP’s core business model in much the same way Mr. Lesser does. (*See* the discussion of “rate arbitrage” in Section II.H., *infra.*) And Mr. Lesser’s discussion of NEP’s billing practices is supported by depictions of the actual bills. The facts described in other portions of Mr. Lesser’s testimony may be supported through the testimony of AEP Ohio’s other witnesses or cross-examination of NEP’s witnesses. NEP will have the opportunity to cross-examine Mr. Lesser regarding the basis for his opinions, and can explain in post-hearing briefs if it believes AEP Ohio has failed to provide a sufficient foundation for any other assertions in his testimony. It would be premature, however, to strike portions of Mr. Lesser’s testimony *before* he testifies, simply because NEP disagrees with his descriptions of NEP’s business or believes that AEP Ohio will not be able to support his assertions at hearing.

**F. Mr. Lesser lays the necessary foundation for his opinion that NEP procures electric distribution service for resale.**

In addition, NEP moves to strike portions of Mr. Lesser’s testimony because NEP believes those portions “presuppose[ ] facts” that Mr. Lesser has failed to prove. (*See* NEP Motion to Strike Lesser Testimony at 11.) In particular NEP asserts that “Mr. Lesser has laid no foundation” for his belief that “NEP is procuring electric distribution service for resale,” and thus the testimony should be struck. (*Id.*)

In fact, Mr. Lesser lays exactly that foundation. On page 49 of his testimony, Mr. Lesser is asked how “NEP procure[s] electric distribution service for resale from AEP Ohio at the master meter[.]” (Lesser Testimony at 49:4-5.) Mr. Lesser then explains that, for the complexes served by NEP in AEP Ohio’s service territory, AEP Ohio sends its bills “to NEP’s corporate address, not the individual landlords’ addresses, and then NEP pays those bills,” pursuant to NEP’s contract. (*Id.* at 49:24 – 50:20.) Because Mr. Lesser has explained the basis for his testimony regarding NEP’s procurement of electric distribution service for resale, NEP’s motion to strike that testimony should be denied.

**G. Ms. Mayhan’s testimony describing the Company’s legal position on the proper interpretation of its tariffs is not “hearsay.”**

Turning to NEP’s next motion to strike, NEP begins by asking the Commission to strike six lines of Jaime Mayhan’s testimony in which she describes AEP Ohio’s legal position with regard to its tariff. Ms. Mayhan is the Director of Regulatory Services for AEP Ohio. (Mayhan Testimony at 1:6-7.) On pages 3 and 4 of her testimony, Ms. Mayhan quotes the provision of AEP Ohio’s tariff that address the resale of energy from a landlord to a tenant and references another provision that permits master meter configurations at apartment complexes. She then references AEP Ohio’s counsel’s explanation of the manner in which those two provisions work together. (*See id.* at 4:22 – 5:4.)

NEP asserts that this portion of Ms. Mayhan’s testimony is “inadmissible hearsay” because it repeats a statement of a third party (“her legal counsel”) “for the truth of the matter asserted \* \* \*.” (NEP Motion to Strike Mayhan Testimony at 1.) But as the Commission has held repeatedly, the hearsay rules are not strictly applicable in Commission proceedings:

When the Commission has deemed it appropriate, it has allowed the admission of hearsay testimony. We note that hearsay rules are designed, in part, to exclude evidence, not because it is not relevant or probative, but because of concerns regarding jurors’ inability to weigh evidence

appropriately. These concerns are inapplicable to administrative proceedings before the Commission, as the Commission has the expertise to give appropriate weight to testimony and evidence.

*In re Application of Ohio Power Co. and Columbus Southern Power Co. for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, Opinion and Order, at 13 (Dec. 14, 2011).

Accordingly, even if the quoted portions of Ms. Mayhan's testimony were hearsay, that would not necessarily justify striking them.

Regardless, AEP Ohio is not offering that portion of Ms. Mayhan's testimony for the truth of the matter asserted. Ms. Mayhan is simply noting the Company's position as it relates to the tariff provisions she just discussed. Nor, as NEP further asserts (*see* NEP Motion to Strike Mayhan Testimony at 1), is Ms. Mayhan offering a legal opinion. Ms. Mayhan is not an attorney and does not have a law degree. (*See* Mayhan Testimony at 1:8 – 2:2.) That is the reason she cites the advice of counsel, rather than simply offering the position herself: to flag for the Commission that she is not offering her own legal opinions. And NEP does not need to "cross-examine the unnamed legal counsel" (NEP Motion to Strike Mayhan Testimony at 3) to determine the basis for AEP Ohio's interpretation of its tariff sheets, because AEP Ohio has no intention of citing this portion of Ms. Mayhan's testimony to support its legal conclusions. AEP Ohio will explain its position in its post-hearing briefs. This portion of NEP's motion to strike Ms. Mayhan's testimony should be denied.

**H. Ms. Mayhan's "rate arbitrage" analysis is directly relevant to NEP's business model and discussed in NEP's own testimony.**

Next, NEP moves to strike the portion of Ms. Mayhan's testimony that discusses the difference between "the charges residential customers would pay before and after a multi-housing complex is converted to master-metered service." (NEP Motion to Strike Mayhan

Testimony at 4.) NEP asserts that this is irrelevant to whether NEP is a public utility. But NEP has misread, and therefore mischaracterizes, the testimony.

In *Wingo*, the Supreme Court of Ohio commented that “third-party resellers such as NEP \* \* \* make their profit largely because they are able to purchase utility services at a [price] that is less than the resale price they charge to individual customers.” *Wingo*, 2020-Ohio-5583, ¶ 3. NEP witness Teresa Ringenbach refers to this as “rate arbitrage.” (*See, e.g.*, Ringenbach Testimony at 23:17.) According to Ms. Ringenbach, “the core of NEP’s business model today” is that the owner of the apartment complex “ask[s] the utility to provide a single master meter” and “pay[s] the utility for its services[,] and then meter[s] and bill[s] their tenants” at a rate no higher “than what the then-current utility residential charges are for similar electricity usage.” (*Id.* at 4:23 – 5:6; 13:5-7.) The owner of the apartment complex then “is obligated to pay” “[t]he arbitrage margin between the commercial master meter bill and the aggregate tenant residential bills” “as a fee for NEP’s services.” (*Id.* at 17:6-8.)<sup>4</sup> In other words, NEP makes its money because its landlord customers convert their complexes to master-meter service; charge their tenants the incumbent electric utility’s residential rates; and then pay the difference between the master-meter service costs and the tenants’ utility payments to NEP as a fee.

An illustrative example of this “rate arbitrage” is what Ms. Mayhan’s testimony depicts. Ms. Mayhan takes the electricity usage during September 2022 at one of the five apartment complexes at issue in this proceeding, calculates how much the complex would be paying under AEP Ohio’s GS Secondary or GS Primary rate, and then compares it to the amount the complex’s tenants would be paying NEP for their electric service if they are paying rates equal to

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<sup>4</sup> In truth, as AEP Ohio witness Lesser testifies, the landlord has very little to do with this process. NEP bills the tenants, pays for the electricity, and pockets the difference as its fee. (*See, e.g.*, Lesser Testimony at 9:23 – 10:2.)

AEP Ohio's residential rates. (*See generally* Mayhan Testimony at 5-6.) NEP may have questions for Ms. Mayhan about her calculations, such as the identity of the apartment complex she used for her calculations (*see* NEP Motion to Strike Mayhan Testimony at 4), but that does not make her testimony "highly prejudicial"; it just means NEP has questions to ask Ms. Mayhan on cross-examination. NEP's motion to strike this portion of Ms. Mayhan's testimony should be denied.<sup>5</sup>

**I. Mr. Williams's testimony regarding AEP Ohio's reasons for filing its complaint against NEP is relevant because it is responsive to NEP's counterclaim.**

In NEP's third motion to strike, NEP moves to strike testimony by AEP Ohio witness Jon Williams regarding "how third-party submetering is growing as a business in its service[ ] territory and the resulting impact on AEP Ohio's business in Ohio." (NEP Motion to Strike Williams Testimony at 3.) NEP asserts that this testimony must be struck because it is irrelevant to "whether NEP is supplying electricity pursuant to R.C. 4905.02 or 4905.03 \* \* \* and/or acting as a competitive retail electric services ('CRES') provider." (*Id.*)

In *Wingo*, the Supreme Court of Ohio found the fact that "submetering is [now] big business, with third-party resellers such as NEP providing submetering services for multiple properties and landlords[.]" relevant background information. *Wingo*, 2020-Ohio-5583, ¶ 3. NEP only argues that Mr. Williams testimony is not relevant "to the three counts presented in AEP Ohio's complaint." (NEP Motion to Strike Williams Testimony at 3.) But the testimony set forth on pages 5-7 of Williams' testimony is directly relevant to supporting AEP Ohio's claims against NEP because they form imperative background regarding the nature and breadth

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<sup>5</sup> In NEP's motion to strike Mr. Lesser's testimony, NEP similarly moves to strike his description of NEP's "rate arbitrage" as speculative and irrelevant. (*See* NEP Motion to Strike Lesser Testimony at 9.) AEP Ohio asks the Commission to deny that portion of the motion to strike Mr. Lesser's testimony for the same reasons it should deny NEP's motion to strike Ms. Mayhan's testimony.

of NEP's submetering in AEP Ohio's territory, which bears directly on each of the three prongs of the *Shroyer* test – especially the component of whether the utility business is ancillary to the entity's primary business – and whether NEP is operating as a public utility under Ohio statutes.

Even if the Commission were to agree that Mr. Williams' testimony is not relevant to support AEP Ohio's claims (it is most certainly relevant), the testimony should still not be struck because it is directly responsive to NEP's counterclaims, which were utterly ignored in NEP's Motion to Strike. The sections of Williams' testimony that NEP has moved to strike is not simply about NEP's growth and the impact of that growth on AEP Ohio. It is a response to the question, "Why did AEP Ohio file this complaint case against NEP?" (Williams Testimony at 5:8.) In NEP's Counterclaim, NEP offers its answer to that question, asserting that "AEP Ohio filed its complaint to harass and maliciously injure NEP including NEP to incur needless litigation costs." (NEP Counterclaim ¶ 30.) NEP's Counterclaim also asserts, *inter alia*, that AEP Ohio is discriminating against NEP. (*Id.* at 35.) Through Mr. Williams's testimony, AEP Ohio is providing the true explanation for AEP Ohio's decision to file a complaint against NEP. Because the testimony is responsive to an allegation in NEP's counterclaim, the Commission should deny NEP's motion to strike the referenced testimony.

**J. Mr. Williams's testimony regarding the effects on AEP Ohio's dealings with landlords and tenants when NEP converts an existing apartment complexes and becomes a third-party submetering provider is relevant to NEP's status as a public utility and based upon Mr. Williams' knowledge.**

Next, NEP moves to strike pages 8 through 9 and part of page 10 of Mr. Williams's testimony on the grounds that AEP Ohio's "relationships with landlords and residential customers" are irrelevant to the Commission. (NEP Motion to Strike Williams Testimony at 3.) NEP provides no support or analysis for this argument other than baldly making the assertion and citing to Evid.R. 402. (*Id.* at 3.) On these pages, Mr. Williams describes its standard



interactions with customers and describes how “NEP effectively supplants AEP Ohio as the primary point of contact” (Williams Testimony at 9:7-8) for both the landlord and its tenants. This is, again, directly relevant to whether NEP is engaging in the business of supplying electricity to retail consumers. Mr. Williams’s subsequent discussion of the customer confusion (*see id.* at 6) and losses of consumer protections that occurs when NEP begins serving an apartment complex (*see id.* at 10-11) is relevant to the Commission’s interpretation of R.C. 4905.03 and its crafting of injunctive relief, as discussed above in response to NEP’s motion to strike Mr. Lesser’s testimony. (*See* Section II.B., *supra*, discussing the relevance of “harm” testimony.)

NEP also moves to strike chunks of Mr. Williams’s testimony regarding (1) the impacts of severing AEP Ohio’s relationship (Williams Testimony at 10:6-23; 11:1-23; 12:1-6); (2) “the complications from third-party submetering also create confusion for customers,” (Williams Testimony at 12:7-19); and (3) the expenditures of AEP Ohio resources on third party submetering (Williams Testimony at 13:1-23; 14:1-4) on the grounds that Mr. Williams “provides no support for this conclusion” and that Mr. Williams speculates about customer confusion. (NEP Motion to Strike Williams Testimony at 4.) But Mr. Williams explained the foundation for his statements. Mr. Williams is a corporate representative as part of AEP Ohio management, so he certainly has knowledge about the regulated services that AEP Ohio offers that would no longer be available to residential customers when they are submetered (Williams Testimony Page 6, Lines 6-12, Page 11, lines 1-23, and Page 12, lines 1-6). Whether there are any “benefits” offered by third-party submetering does not make Mr. Williams’ testimony about the severance of AEP Ohio’s services speculative. NEP can (and did) present what purported benefits they believe are generated by third-party submetering. Mr. Williams also explains the

basis of his opinion regarding customer confusion (Williams, Page 12, lines 7-19): the fact that “AEP Ohio’s call center has [had] to field calls from customers that are confused about their electricity provider.” (Williams Testimony at 6:22 – 7:1.) Mr. Williams elaborated on this point and offered further support for his testimony in his recent deposition – he received information from his team, the call center, and that he reviewed a spreadsheet of call logs. NEP may cross-examine Mr. Williams about that testimony, but it is not speculative. Finally, as a corporate representative in AEP Ohio’s upper management Jon Williams certainly has knowledge about the drain on AEP Ohio resources caused by third-party submetering requests and conversions. In fact, NEP has not articulated any reason why these statements (Williams Testimony at 13:1-23; 14:1-4) are speculative.

Finally, NEP tries to extend their relevance argument (without requesting to strike pages 10-14, 18 on the basis of relevance) by arguing that these statements are “double prejudicial because [they are] not relevant to any of the three counts raised in AEP Ohio’s claims.” (NEP Motion to Strike Williams Testimony at 4.) But for the reasons discussed previously, the information contained in pages 10-14 and 18, of Mr. Williams’ testimony bears directly on AEP Ohio’s claims as well as NEP’s counterclaims (which are once again ignored by NEP).

### **III. CONCLUSION**

For the reasons provided above, AEP Ohio respectfully requests that the Commission deny NEP’s motion to strike the cited portions of the pre-filed testimony of Company witnesses Steven Lesser, Jaime Mayhan, and Jon Williams.

Respectfully submitted,

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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 21<sup>st</sup> day of October, 2022, via email.

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