

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.

SECOND ENTRY ON REHEARING

Entered in the Journal on December 13, 2023

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Ohio Power Company on October 6, 2023.

II. RELEVANT PROCEDURAL HISTORY

{¶ 2} On September 24, 2021, the Ohio Power Company (AEP Ohio) filed a complaint against Nationwide Energy Partners, LLC (NEP). As background, AEP Ohio 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 explained that it has been granted a service territory under the Certified Territories 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 stated 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 explained that the complaint arose 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 asserted would amount to NEP taking over electric distribution service to the tenants in the Apartment Complexes. AEP Ohio alleged 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. In the complaint, AEP Ohio alleged that allowing NEP to begin submetering at the Apartment Complexes would violate numerous statutes and Commission regulations, including the Certified Territories Act, as NEP would be operating as a public utility. AEP Ohio asserted 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*).

{¶ 3} On October 18, 2021, NEP filed its answer to the complaint. NEP admitted 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 Territories Act. NEP further admitted that it provides certain management services to property owners, managers, and developers pursuant to private contractual agreements. NEP conceded 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 charges on behalf of the respective property owner, manager, and developer. NEP denied, 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 denied that it is a public utility under R.C. 4905.02 and, therefore, NEP asserted that it is not subject to the Commission's statutes and rules governing public utilities. NEP's answer also asserted a number of affirmative defenses.

{¶ 4} On October 28, 2021, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene and accompanying memorandum in support. NEP filed a memorandum contra this motion to intervene on November 12, 2021; OCC filed a reply in support on November 19, 2021. As part of a January 31, 2022 Entry, the attorney examiner denied OCC's motion to intervene.

{¶ 5} By Entry issued December 28, 2021 (the Stay Entry), the attorney examiner granted NEP's December 10, 2021 motion for a stay. As outlined in the Stay Entry, the attorney examiner found that NEP satisfied the four-factor test adopted by the Commission to determine whether a stay should be granted in a Commission proceeding. The Stay Entry stated that 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 agreed 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.

{¶ 6} On January 3, 2022, AEP Ohio filed an interlocutory appeal (or, in the alternative, request for certification of interlocutory appeal) of the ruling in the Stay Entry which granted NEP's request for a stay. AEP Ohio asserted that the Stay Entry exceeded the attorney examiner's authority and, therefore, the Commission should consider its interlocutory appeal as of right. Alternatively, AEP Ohio argued that 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. As to the actual appeal, AEP Ohio argued that the Commission should reverse the ruling for five primary reasons outlined therein.

{¶ 7} On January 11, 2022, NEP filed a motion for leave to file an amended answer and counterclaim, instant. On January 26, 2022, AEP Ohio filed a memorandum contra NEP's motion. On February 2, 2022, NEP filed a reply in support of its motion.

{¶ 8} On February 7, 2022, OCC filed an interlocutory appeal of the attorney examiner's January 31, 2022 ruling that denied OCC intervention in this proceeding. Because OCC's interlocutory appeal sought reversal of a decision to deny OCC intervention in the case, its interlocutory appeal came before the Commission as an appeal of right pursuant to Ohio Adm.Code 4901-1-15(A)(2).

{¶ 9} On April 4, 2022, the attorney examiner issued an Entry granting NEP's motion for leave to file an amended answer and counterclaim, as well as revised the procedural schedule.

{¶ 10} AEP Ohio filed its answer to NEP's counterclaim on April 22, 2022. On May 2, 2022, AEP Ohio filed an amended answer to the counterclaim. NEP filed correspondence in the case docket on May 5, 2022, indicating that NEP did not object to the filing of AEP Ohio's amended answer.

{¶ 11} By Entry issued July 27, 2022, this Commission denied AEP Ohio's interlocutory appeal of the Stay Entry and affirmed the attorney examiner's denial of OCC's intervention in this proceeding.

{¶ 12} On August 26, 2022, OCC filed an application for rehearing of the Commission's denial of its interlocutory appeal. This application for rehearing was denied by operation of law pursuant to R.C. 4903.10.

{¶ 13} The evidentiary hearing commenced on October 24, 2022, at the offices of the Commission, with the first phase of the hearing continuing through November 1, 2022. On November 4, 2022, the hearing recommenced via Webex to take a witness' testimony. Then on November 8, 2022, the hearing recommenced via Webex to close the record and set a briefing schedule.

{¶ 14} In its September 6, 2023 Opinion and Order (Opinion and Order), the Commission found that AEP Ohio failed to carry its burden of proving that NEP is (i) engaged in the business of supplying electricity, is an "electric light company" under R.C.

4905.03(C), or a “public utility” under R.C. 4905.02(A); (ii) operating as an “electric supplier” within Ohio Power Company’s certified territory in violation of R.C. 4933.83(A); and (iii) violating R.C. 4928.08(B) by supplying or arranging for the supply of a competitive retail electric service without the required certification. With respect to counterclaims filed by NEP, the Commission found that NEP failed to carry its burden of proving that AEP Ohio’s actions (i) violated R.C. 4905.26, except to the second alleged violation of Count I of its counterclaims where the Commission found in favor of NEP on a limited basis, and (ii) violated R.C. 4905.35(A). Additionally, the Commission directed AEP Ohio to file an application to modify its electric service resale tariff to include certain provisions related to landlords engaging in the resale of electricity to tenants.

{¶ 15} Pursuant to R.C. 4903.10, any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the Commission’s order is journalized.

{¶ 16} On October 6, 2023, AEP Ohio filed an application for rehearing (Application for Rehearing), asserting that the Opinion and Order was unlawful and unreasonable based upon four grounds for rehearing outlined therein. NEP filed a memorandum contra AEP Ohio’s Application for Rehearing on October 16, 2023.

{¶ 17} Also on October 6, 2023, OCC filed a motion for leave to file instant an application for rehearing as well as an application for rehearing. NEP filed a memorandum contra OCC’s application for rehearing on October 16, 2023.¹

{¶ 18} By Entry issued November 1, 2023, the Commission granted AEP Ohio’s Application for Rehearing for the limited purpose of affording the Commission more time to consider the issues raised therein.

¹ OCC’s motion for leave to file is now considered moot, as any application for rehearing it filed would have been denied by operation of law pursuant to R.C. 4903.10.

III. DISCUSSION

{¶ 19} In the Application for Rehearing, AEP Ohio reiterates its position regarding submetering and its general posture in this proceeding – that the *Wingo* remand left a gap in the law such that it was unclear what constituted “unlawful” resale of electricity under AEP Ohio’s resale tariff. AEP Ohio believes that the Commission ignored the Supreme Court’s reference to the “big business” form of submetering by third-party companies such as NEP. AEP Ohio submits that the Opinion and Order was unlawful and unreasonable in four respects. First, AEP Ohio argues that the Commission erred by misinterpreting R.C. 4905.26 as a source of substantive rights, as opposed to a procedural statute, and finding that AEP Ohio violated R.C. 4905.26 “on a narrow and limited basis...to the extent it applies to NEP.” Second, AEP Ohio submits that the Commission erred by *sua sponte* ordering AEP Ohio to establish a new “reseller tariff.” Third, AEP Ohio argues that the Commission should have applied the “plain language” of R.C. 4905.03(C) and concluded that NEP is engaged in the business of supplying electricity and is, therefore, an “electric light company” and “public utility” under Ohio law. Finally, AEP Ohio believes that it was unlawful for the Commission to direct AEP Ohio to convert the Apartment Complexes to master-metered service without first determining whether such conversions would be “reasonable” under R.C. 4905.20 and 4905.21 (the Miller Act) and, thus, the Opinion and Order violates the Miller Act.

{¶ 20} In its memorandum contra, NEP submits that the Commission should deny the Application for Rehearing, as it raises no specific grounds upon which it considers the Opinion and Order to be unreasonable or unlawful. Rather, NEP argues that AEP Ohio, in essence, simply disagrees with the Commission’s decision and reprises arguments previously raised at the hearing and in briefs. NEP states that none of AEP Ohio’s four grounds for rehearing are sufficient to grant the application.

{¶ 21} The Commission will address each of AEP’s grounds for rehearing, as well as NEP’s response, below. Any claim or argument raised in the Application for Rehearing

that is not specifically discussed herein was nevertheless thoroughly and adequately considered by the Commission and is denied. As was the case in the Opinion and Order, any evidence and/or argument raised in the Application for Rehearing that is not specifically addressed herein has nevertheless been fully considered and weighed by the Commission and is hereby denied.

A. *First Ground for Rehearing: The Commission's "Narrow and Limited" Ruling in Favor of NEP on Part 2 of NEP's Count I is an Unreasonable and Unlawful Application of the Complaint Case Statute, R.C. 4905.26.*

{¶ 22} AEP Ohio first argues that because NEP did not devote substantial portions of its post-hearing briefs to this part of its counterclaims, this allegation was “not a focus” of NEP’s case and it was, therefore, unreasonable, unlawful, and against the manifest weight of the evidence for the Commission to have made this ruling (App. for Rehearing at 16-17). However, the Commission based its ruling on the evidence in the record of this case, rather than the degree to which the parties addressed the issue on brief, and there is no dispute in the record of this case that AEP Ohio had modified its previous practice to deny property owner requests to convert existing buildings to master-metered service unless the property owner agreed to not contract with a third-party submetering company.

{¶ 23} AEP Ohio reiterates an argument that it only first raised in its post-hearing reply brief – that R.C. 4905.26 is a jurisdictional and procedural mechanism, not an independent standard that an entity can “violate.” In support of this position, AEP Ohio again points to an attorney examiner entry in Case No. 05-1011-EL-CSS, et al. (*Allianz*), in which an attorney examiner stated that R.C. 4905.26 “does not establish any particular duty to serve.”² AEP Ohio also points to a Commission entry issued in Case No. 77-862-GE-CSS (*Ihlendorf*), in which the Commission referred to R.C. 4905.26 as the procedural vehicle for bringing complaints before the Commission, as well as a 1975 Ohio Supreme Court decision

² *In Re Allianz US Global Risk Ins. Co. v. FirstEnergy Corp.*, Case No. 05-1011- EL-CSS, et al., Entry at ¶ 34 (Aug. 7, 2006).

on the topic.³ AEP Ohio stresses that R.C. 4905.26 is purely a procedural statute for bringing concerns before the Commission and does not create any independent claim, as there is no substantive regulatory obligation or independent statutory compliance obligation placed by it on a public utility. (App. for Rehearing at 17-23.)

{¶ 24} Regardless of the exact nature of R.C. 4905.26, AEP Ohio also argues that it was unreasonable for the Commission to fault AEP Ohio for its actions following *Wingo* because AEP Ohio faced an uncertain legal issue and had no guidance from the Commission. AEP Ohio states that it acted in good faith in its actions toward NEP and other third-party submetering companies, as it tried to understand the implications of the *Wingo* decision on the mirroring effect of Section 18 of the Terms and Conditions of AEP Ohio's tariffs. According to AEP Ohio, any decision it made following *Wingo* would have been problematic, which is why it filed the complaint in this case. AEP Ohio points to different sections of the Opinion and Order in which the Commission found that AEP Ohio did not commit an underlying violation of an existing legal or regulatory obligation and that AEP Ohio's pause on conversions was reasonable. (App. for Rehearing at 23-26.)

{¶ 25} AEP Ohio believes that the Commission denied it due process of law by finding that AEP Ohio violated a rule that did not exist at the time it was supposedly violated. AEP Ohio reiterates its contention that R.C. 4905.26 contains no substantive rules that can be "violated." AEP Ohio argues that a holding that R.C. 4905.26 independently imposes a reasonableness standard, and that AEP Ohio violated that standard with its policies toward NEP, would render the statute unconstitutionally vague. AEP Ohio states that it is, therefore, unreasonable and unlawful for the Commission to find a statutory violation by AEP Ohio based on the Commission "retroactively disagreeing" with AEP Ohio's good faith actions in the wake of the *Wingo* decision. AEP Ohio argues that nothing in R.C. Chapter 49 or the Commission's regulations explicitly prohibit a utility from

³ See *In re Richard Ihlendorf v. The Cincinnati Gas and Electric Co.*, Case No. 77-862-GE-CSS, Entry on Rehearing (Feb. 14, 1979); *Ohio Public Interest Action Group, Inc. v. PUCO*, 43 Ohio St.2d 175 (1975).

adopting a policy of not converting existing apartments to master-metered service if a landlord intends to use a third-party submetering company. As the Commission's decision in this case was the first time that such a policy was deemed unreasonable, AEP Ohio states that it could not have known that the policy would be deemed unlawful. (App. for Rehearing at 31-35.)

{¶ 26} Finally, AEP Ohio asserts that a finding that AEP Ohio violated R.C. 4905.26 is unnecessary to reach the same result in this case as to whether NEP is illegally operating as a public utility. AEP Ohio states that the Commission does not need to find a violation of a public utility statute before ordering a public utility to modify its practices. Instead, it need only find that a policy is unreasonable under R.C. 4905.37, and it may then take actions to remedy such practices. (App. for Rehearing at 35-36.)

{¶ 27} NEP responds that the Commission properly granted its counterclaim I, subpart 2, in finding that AEP Ohio's new policy basing approval of requests to convert to master-metered service upon whether a property owner planned to utilize a third-party service provider violates R.C. 4905.26. NEP states that claims for unjust or unreasonable treatment may be brought under the clear and unambiguous language of the statute. NEP accuses AEP Ohio of taking previous Commission entries out of context regarding R.C. 4905.26, pointing out that the *Allianz* entry cited by AEP Ohio is an attorney examiner entry addressing a motion to strike and, further, the complaint count at issue in that case dealt with a duty to serve. In contrast, NEP's counterclaim was against AEP Ohio rendering its service in an unjust, unreasonable, unjustly discriminatory, and unjustly preferential manner – the exact language in R.C. 4905.26. NEP argues that AEP Ohio conflates the Commission's findings that the pausing of third-party conversions may have been proper but that the new blanket denial policy of conversion requests involving third-party submetering companies was unfounded and unreasonable. (Memo Contra at 2-6.)

{¶ 28} NEP is unmoved by AEP Ohio's assertion of its due process rights being violated for similar reasons outlined above, primarily that the counterclaim brought by NEP

mirrors the exact language found in R.C. 4905.26. Thus, NEP dismisses AEP Ohio's void-for-vagueness arguments, as NEP finds nothing vague about the language in R.C. 4905.26. Rather than being subjected to tariff compliance with a rule it did not know existed, as claimed by AEP Ohio, NEP states that AEP Ohio's violation of R.C. 4905.26 was based on its new denial of master-metered conversions involving third-party companies. (Memo Contra at 7-9.)

{¶ 29} First, we address the contention that R.C. 4905.26 is purely procedural and provides no substantive jurisdiction by itself. The Commission denies AEP Ohio's first ground for rehearing but does clarify the extent of its finding with respect to NEP's first counterclaim. The Commission did not devote significant portions of the Opinion and Order to AEP Ohio's R.C. 4905.26 jurisdictional argument - which AEP Ohio first raised in its reply brief, not in its answer to the counterclaims, its amended answer to the counterclaims, at the evidentiary hearing, or in its initial post-hearing brief - but did, nonetheless, consider the argument in formulating the Opinion and Order (Opinion and Order at ¶ 314). Rather, it was implicitly rejected by our narrow and limited finding with respect to NEP's counterclaim Count I, second violation. This is not a departure from past Commission precedent, as the Commission previously dealt with the same argument in a similar fashion. See *In re the Complaint of Sprint Communications Company L.P. v. Ameritech Ohio*, Case No. 96-142-TP-CSS, Entry on Rehearing (Nov. 6, 1997) at ¶ 14 ("[w]e find no error in not specifically commenting upon this portion of Ameritech's arguments in our Opinion and Order because we, nevertheless, rejected it (implicitly by making the findings that we did and explicitly on page 34, when we rejected all arguments raised by the parties but not specifically addressed)."). AEP Ohio's reliance on an attorney examiner entry in *Allianz*, dealing with a distinctly different procedural issue, does not provide support overriding the precedential value of the Commission's *Ameritech* entry. Likewise, AEP Ohio's interpretation of the Commission's ruling in *Ihlendorf* takes it well beyond its intended reach. To find that R.C. 4905.26 is a purely procedural statute would invalidate numerous consumer complaint cases, a large majority of which are brought under R.C.

4905.26 for alleged unjust, unreasonable, or unjustly discriminatory practices by a regulated public utility. A particular practice of a public utility may not be specifically prohibited by statute or rule but could still rise to the level of being unjust or unreasonable based on the facts pleaded in a complaint. R.C. 4905.26 provides the avenue for such complaints to be brought before the Commission, as NEP validly did with its counterclaims in this case. In any event, as AEP Ohio suggests, R.C. 4905.37 provides a separate and sufficient basis for our conclusion that the practice adopted by AEP Ohio of declining to provide master-metered service to the Apartment Complexes in response to the Court's *Wingo* decision, while perhaps undertaken in good faith, nevertheless was not just and reasonable. Accordingly, that statute also provides a jurisdictional basis for prescribing the practices we have directed AEP Ohio to adopt in our Opinion and Order.

{¶ 30} Next, we address AEP Ohio's argument that it was denied due process by being found to have "violated a rule that did not exist at the time." Ultimately, we find it unconvincing. The language of R.C. 4905.26 is unambiguous. That provision authorizes the Commission, among other things, to review allegations that public utilities are engaging in any practice affecting or relating to any service that is in any respect unreasonable or unjust. And the Commission has previously held that R.C. 4905.26 prohibits a public utility from rendering any unjust, unreasonable, unjustly discriminatory, or unjustly preferential charge, rate, or service. *In re MCImetro Access Transmission Services, Inc., v. Ameritech Ohio*, Case No. 97-1490-TP-CSS, Opinion and Order (Aug. 13, 1998) at 20. Consumers routinely file complaints against AEP Ohio under R.C. 4905.26 for alleged unjust or unreasonable practices, which AEP Ohio responds to. In this case, we will clarify that the Commission found that NEP met its burden of proof pursuant to R.C. 4905.26, on a very narrow and limited allegation, based upon AEP Ohio's modified practice of denying property owner requests for conversion of existing buildings to master-metered service based solely on the involvement of a contracted third-party submetering company, to the extent it applied to NEP. While the Commission repeatedly noted that AEP Ohio's uncertainty as to the legal

landscape of submetering post-*Wingo* was reasonable and in good faith,⁴ we found that the modification of its existing practice was unjust and unreasonable pursuant to R.C. 4905.26. Moreover, we made no finding in the Opinion and Order that AEP Ohio had provided inadequate service as defined in R.C. 4905.26. We note, again, that R.C. 4905.37 also provides a basis for reaching the same result in an R.C. 4905.26 complaint case. Consequently, we deny rehearing on this assignment of error, but clarify the limited and narrow extent to which we have concluded that NEP has met its burden of proof with regard to its first counterclaim.

B. Second Ground for Rehearing: The “Electric Reseller Tariff” Ordered by the Commission is unlawful under the Commission’s Own Interpretation of “Electric Light Company” Under R.C. 4905.03(C), Violates the Statutory Rulemaking Procedures in R.C. Chapter 106, and Results in an Unreasonable Tariff Paradigm.

{¶ 31} In its second ground for rehearing, AEP Ohio asserts that the new electric reseller tariff language directed by the Commission is simply a restatement of the “SSO Price Test” rejected by the Supreme Court in the *Wingo* decision. Rather than complying with the directive from the Supreme Court, AEP Ohio states that the Commission is attempting a “Solomon-like ‘split the baby’ approach” where it finds that it has no jurisdiction over third-party submetering companies such as NEP but still attempts to implement consumer protections by implementing a “nearly identical” test to the one rejected by the Court in *Wingo*. Further, AEP Ohio argues that by ordering it to file the amended reseller tariff, the Commission expanded the scope of the disconnection rules in Ohio Adm.Code 4901:1-18 and enacted rules of general applicability without following the rulemaking procedures found in R.C. Chapter 106. AEP Ohio states that the Commission manufactured a way to protect tenants by mandating that AEP Ohio’s reseller tariff be amended to include certain

⁴ While the Commission noted that AEP Ohio’s uncertainty was reasonable, we also noted that the Company’s imposing such a policy change in the midst of the dispute seemed to run contrary to AEP Ohio’s desire to wait for further Commission guidance on the issue. Opinion and Order (Sept. 6, 2023) at ¶ 262.

language requiring landlords to follow the Commission's disconnection procedures. (App. for Rehearing at 36-41.)

{¶ 32} AEP Ohio believes that the Commission did not, prior to directing that the tariff language be filed, provide notice and opportunity to be heard from entities that will be affected by the amended reseller tariff. AEP Ohio also avers that in its directive the Commission-ordered protections for certain tenants in the state of Ohio (those in AEP Ohio's service territory) and not for tenants throughout the rest of the state. AEP Ohio believes that the type of protections contemplated in the amended reseller tariff language are better suited for the Commission's administrative rules, which would make them applicable to all public utilities and customers across the state, rather than in a proceeding such as this. Further, AEP Ohio asserts that the Commission failed to follow statutory procedures for amending administrative rules. In support, AEP Ohio argues that the protections that the Commission directed AEP Ohio to include in the amended tariff are the "functional equivalent" of new regulations. In particular, AEP Ohio states that Ohio Adm.Code 4901:1-18 already contains disconnection provisions applicable to landlord-tenant circumstances. The Opinion and Order, according to AEP Ohio, slyly exchanges the protections found in Ohio Adm.Code 4901:1-18 for the regulated utility disconnection protections throughout the rest of that chapter. AEP Ohio appears to agree that many of these protections are appropriate for residential customers, but it believes that the Commission did not follow the statutory processes for amending administrative rules contained in R.C. Chapter 119. (App. for Rehearing at 41-46.)

{¶ 33} AEP Ohio asserts that once the Commission found that neither NEP nor landlords are "electric light companies" or "public utilities," then the Commission no longer has jurisdiction over those entities. Therefore, AEP Ohio avers that the Commission cannot attempt to regulate those entities through AEP Ohio's tariffs as if the Commission does have jurisdiction to initiate such regulations. AEP Ohio concedes that the Commission has the authority to adopt wide-ranging regulations governing public utilities, or to institute narrow tariff provisions addressing conduct of those who purchase electricity from AEP

Ohio. The tariff provisions in the Opinion and Order, however, go far beyond these parameters, according to AEP Ohio, and see the Commission attempting to exercise the type of authority that it would have over an “electric light company” under R.C. 4905.03(C). (App. for Rehearing at 46-47.)

{¶ 34} AEP Ohio also questions how the reseller tariff provisions directed by the Commission could even be workably enacted and enforced. AEP Ohio avers that to successfully enforce such a tariff it would have to have access to and review masses of information relating to all master-metered tenants within its service territory. Relatedly, AEP Ohio expresses concern about expending resources on such enforcement actions without cost recovery. To the extent that a third-party submetering company or landlord may be violating the terms of the amended tariff provisions, AEP Ohio questions how such a complaint could be brought, since R.C. 4905.26 covers complaints around the service of a “public utility,” which the Commission determined the third-party submetering companies and landlords not to be. AEP Ohio further runs through various hypothetical scenarios in which it is uncertain how the tariff provisions would be enforced. (App. for Rehearing at 46-53.)

{¶ 35} NEP responds that AEP Ohio’s second ground for rehearing is premature, which NEP believes stems from AEP Ohio’s mistaken assumption that the Opinion and Order directed AEP Ohio to provide a final form tariff within the 90-day window. NEP believes that the type of concerns raised by AEP Ohio can be raised and resolved through the typical Commission review and approval process for tariffs. NEP understood the Commission’s directive as instructing AEP Ohio to file a proposed tariff for approval, which Staff will review for compliance, and ultimately the Commission will approve such a tariff in final form. NEP believes that the enforcement concerns and hypotheticals raised by AEP Ohio are also misplaced, as ultimately it will be the Commission enforcing the directed consumer protections, not AEP Ohio. NEP states in the four cases cited in the Opinion and Order, in which the Commission directed gas companies to include certain consumer protections in tariffs, such protections are enforced by the Commission, not the gas utilities.

As an example, NEP points to how competitive retail natural gas service (CRNGS) providers refer marketing non-compliance matters to Staff for investigation and Staff routinely resolve such concerns. NEP offers the use of certifications of compliance from master-meter property owners as a compliance mechanism that could be approved in the normal tariff application process and would then be easily implemented and enforced by AEP Ohio going forward. (Memo Contra at 10-13.)

{¶ 36} The Commission finds that AEP Ohio's second ground for rehearing is without merit. As stated in the Opinion and Order, the Commission has previously noted that it has the authority to regulate public utilities in order "...to set terms and conditions on the resale of a utility's service to ensure that such service is provided in a manner which is safe and consistent with the public interest" and have specifically noted the disconnection procedures in Ohio Adm.Code Chapter 4901:1-18 as an example of this "requisite authority" (Opinion and Order at ¶ 225, citing *In re Complaint of Michael E. Brooks, et al. v. The Toledo Edison Co.*, Case No. 94-1987-EL-CSS, Opinion and Order (May 8, 1996) at 16, footnote 12, citing *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WSCSS, et al., Opinion and Order (Feb. 27, 1992) at 5). We chose to exercise this authority to direct AEP Ohio to file the new electric reseller tariff that includes the conditions outlined in the Opinion and Order (Opinion and Order at ¶ 224). We identified prior precedent where this Commission exercised similar authority over public utilities' tariffs in order to ensure that consumer protections were incorporated into tariffs, such as instructing the natural gas retail choice programs to include reasonable consumer protections in their tariffs (Opinion and Order at ¶ 225). Despite AEP Ohio's disagreement, this directive is not an attempt by the Commission to improperly regulate entities over which it has no jurisdiction; rather, it is a directive for a public utility to put appropriate restrictions in a tariff as conditions to receive service pursuant to that tariff. In fact, similar behind-the-meter restrictions are included in other AEP Ohio tariffs for other behind-the-meter services, such as those dealing with interconnections. See, e.g., *In re the Commission's Promulgation of Amendments to Rules for Electric Service and Safety Stds. Pursuant to R.C. Chapter 4928*, Case Nos. 99-1613-EL-ORD, et

al., Finding and Order (Aug. 22, 2002); *In re the Application of the Columbus S. Power Co. for Authority to Revise Tariff* P.U.C.O. No. 6 Minimum Requirements for Distribution System Interconnection, Case Nos. 07-1303-EL-ATA, et al. Finding and Order (Sept. 24, 2008); *In re the Application of Ohio Power Co. for Approval to Establish a Generation Station Power Tariff*, Case No. 18-1313-EL-ATA, Finding and Order (Mar. 6, 2019). Nothing raised in AEP Ohio's Application for Rehearing alters our finding that this directive is within the Commission's authority, as the provisions which are to be included in the new reseller tariff are consistent with the public interest of protecting tenants who may lose rights related to electric service if living at a master-metered complex within AEP Ohio's service territory. Likewise, the Commission disagrees with AEP Ohio's assertions that it engaged in some sort of ad hoc rulemaking by issuing the reseller tariff directive in the Opinion and Order. It is well within the Commission's statutory authority to order a tariff amendment as a result of a complaint proceeding before us, as well as consistent with Commission precedent. See, e.g., *In re the Complaint of the Office of the Consumers' Counsel on Behalf of the Residential Customers of The Dayton Power & Light Co. v. The Dayton Power & Light Co.*, Case No. 90-455-GE-CSS, Opinion and Order (Oct. 18, 1990). Further, the Commission expects that other electric distribution utilities (EDUs) will open separate case dockets in which each EDU will file an application to amend its reseller tariff language consistent with the directives contained in the Opinion and Order. At that time, as in AEP Ohio's future tariff filing, interested parties will have a full and fair opportunity to address any proposed tariffs as provided by R.C. 4909.18. See *In re the Certification of Northeast Ohio Public Energy Council as a Governmental Aggregator*, Case No. 00-2317-EL-GAG, et al., Entry (Sept. 7, 2022) at ¶ 14.

{¶ 37} With respect to AEP Ohio's concerns about the potential impact of the tariff and difficulties that may be experienced enforcing it, the Commission agrees that such concerns are premature. An Entry was issued on December 1, 2023, in this case docket which extended the deadline for AEP Ohio to file the new reseller tariff to February 5, 2024, which will allow AEP Ohio ample opportunity to prepare a tariff application containing the

necessary language and to begin to engage with Staff and other interested parties to formulate solutions to such concerns.⁵

{¶ 38} Based on the foregoing, AEP Ohio's second ground for rehearing is denied.

C. *Third Ground for Rehearing: The Commission's Application of the Jurisdictional Statute, R.C. 4905.03(C), to NEP is Legally and Factually Erroneous.*

{¶ 39} In its third assignment of error, AEP Ohio argues that the Commission's determination that NEP is not "engaged in the business of supplying electricity" under R.C. 4905.03(C) and therefore is not an "electric light company" or "public utility" is contrary to the plain meaning of that statute. AEP Ohio disagrees with the Commission's conclusion that in a submetered setup, it is the landlord and not the tenants that are "consumers" under R.C. 4905.03(C). AEP Ohio submits that the common definition of a consumer applies to individual tenants, citing dictionary definitions as support. Regarding the Ohio Supreme Court cases which clearly determined landlords to be the consumers, AEP Ohio offers that none of those cases indicated whether submetered tenants could *also* be consumers. Further, AEP Ohio argues that the Commission's interpretation of the Supreme Court's decisions in *Pledger v. Public Utilities Commission*, 2006-Ohio-2989 (*Pledger*) and other cases cannot be reconciled with the Supreme Court's reasoning in the *Wingo* decision. AEP Ohio avers that if *Pledger* stands for the proposition that tenants are not consumers, the Court would have simply made such a determination and not remanded the case to the Commission. AEP Ohio contends that both the landlord and its tenants are consumers as contemplated in R.C. 4905.03(C). Further, AEP Ohio notes that the Commission's new regulation of submetering through its ordered "electric reseller tariff" indicates that electricity is being resold by a landlord to someone – in this case the tenants. AEP Ohio asserts that such a "resale" means the tenants must be "consumers." (App. for Rehearing at 53-61.)

⁵ The December 1, 2023 Entry also clarified that the proposed tariff application be filed in a separate docket in which all interested parties will have a full and fair opportunity to raise any issues regarding the application. Entry (Dec. 1, 2023) at ¶ 21.

{¶ 40} Similarly, AEP Ohio finds the Commission’s conclusion that NEP is not “engaged in the business of supplying electricity” under R.C. 4905.03(C) to be inconsistent with the statute. AEP Ohio claims that the Commission’s conclusion is based on formalisms such as agency rather than focusing on the plain meaning of the phrases. AEP Ohio again urges the Commission to focus on “substance over form” when applying the definitions in R.C. 4905.03(C). AEP Ohio asserts that if an entity such as NEP is performing actions that public utilities typically carry out, then that entity essentially steps into the shoes of a public utility. AEP Ohio then restates a number of these alleged actions that it previously outlined in its post-hearing briefs. AEP Ohio states that the Opinion and Order does not engage with this list of actions, but instead focuses on a legal formalism such as “agency” to find that NEP is not engaged in the business of supplying electricity. AEP Ohio restates its arguments concerning the legal status of principals and agents, as fully outlined in its post-hearing briefs. (App. for Rehearing at 61-69.)

{¶ 41} NEP responds that AEP Ohio’s third ground for rehearing is a repackaging of the arguments AEP Ohio made at the evidentiary hearing and in post-hearing briefs. As this ground for rehearing raises no new arguments, NEP believes that it should be denied for the reasons already set forth in the Opinion and Order. NEP believes that the Commission was correct in finding that NEP is not engaged in the business of supplying electricity and that this conclusion is supported by the plain meaning of R.C. 4905.03(C). With respect to the definition of “consumer,” NEP agrees with the Commission that there is long-established and determinative case law that identifies the landlord, not the tenant, as the “consumer” in a master-meter context. NEP disagrees with AEP Ohio’s arguments as to what the Supreme Court could have done in *Wingo* if tenants are not “consumers” as pure speculation, as the Court was not tasked with determining whether NEP is a public utility. NEP avers that AEP Ohio offers no new arguments relating to the agency relationship between NEP and the landlords at the Apartment Complexes and that the Commission’s findings on this matter remain correct. (Memo Contra at 13-19.)

{¶ 42} The Commission finds AEP Ohio's third ground for rehearing to be without merit. As pointed out by NEP, the arguments raised in this section of the Application for Rehearing are essentially the same as those already raised by AEP Ohio in its post-hearing briefs and were already fully considered by the Commission in making the findings in the Opinion and Order. AEP Ohio itself acknowledges this in the Application for Rehearing, repeatedly making statements such as "as previously explained in its Initial Brief...and its Reply Brief" or other sweeping references to specific portions of its initial brief and reply brief (App. for Rehearing at 61, 62, 65, 66, 68). The Commission already thoroughly considered and addressed the arguments raised by AEP Ohio in this assignment of error and rehearing should be denied on that basis. The Commission notes, nonetheless, that the evidence in the record demonstrates that NEP is not engaged in the business of supplying electricity or an electric light company under R.C. 4905.03(C) nor a public utility under R.C. 4905.02(A) (Opinion and Order at ¶¶ 1, 179, 197, 207, 322). The Commission is also unpersuaded by AEP Ohio's repeated arguments as to the definition of "consumer" in the context of master-metered service and reaffirms its finding that the approximate 90-years of precedent relied upon by the Commission establishes the landlord as the "consumer" in this context (Opinion and Order at ¶¶ 188-192). Finally, the Commission thoroughly addressed the issues of agency between NEP and the landlords and sees no argument to alter this analysis and associated findings (Opinion and Order at ¶¶ 209-216). AEP Ohio's third assignment of error is, therefore, denied.

D. Fourth Ground for Rehearing: The Commission's Stay Order and Final Order Were Unlawful Because the Commission Failed to Consider Whether AEP Ohio's Forced Abandonment of the Apartment Complexes Was "Reasonable" and Promoted the "Welfare of the Public" Under the Miller Act.

{¶ 43} AEP Ohio restates arguments made in its initial post-hearing brief that the Commission acted unlawfully by not determining whether such conversions are "reasonable" under the Miller Act. In its initial brief, AEP Ohio argued that if the Apartment Complexes were converted to master-metered service then the tenants would cease to be AEP Ohio customers and the equipment at the sites would be abandoned. AEP Ohio argued

that withdrawing its direct service to these tenants would be unreasonable because of the loss of regulatory protections afforded to Ohio customers. AEP Ohio takes issue with the Opinion and Order only devoting a single paragraph to its Miller Act arguments, wherein the Commission rejected the arguments on procedural rather than substantive grounds. AEP Ohio states that it did not waive its Miller Act arguments, as the Miller Act applies to the conversions whether or not AEP Ohio properly plead such a violation in the complaint. AEP Ohio argues, essentially, that the Stay Entry ripened AEP Ohio's alleged Miller Act arguments. Despite R.C. 4905.21 referring to an "application" to abandon filed by a public utility, AEP Ohio believes that R.C. 4905.20 "anticipates" situations such as in this proceeding. Further, AEP Ohio insists that it did clearly invoke the Miller Act in its complaint, as it referenced the Miller Act in five different paragraphs of the complaint. AEP Ohio believes that the complaint meets the standard notice pleading requirements found in the Ohio Rules of Civil Procedure or, at the very least, such a claim could be "inferred" by the Commission. AEP Ohio disagrees that the Miller Act arguments are moot because the conversions already occurred following the Stay Entry. Finally, AEP Ohio does not believe that the Miller Act required it to file a separate application for abandonment in order to invoke the Miller Act in this case. (App. for Rehearing at 69-80.)

{¶ 44} NEP responds that the Commission's determinations as to the Miller Act arguments are consistent with both the law and evidentiary record in this proceeding. NEP views the deferred emphasis on Miller Act arguments as AEP Ohio attempting to once again challenge the Stay Entry. NEP states that AEP Ohio failed to raise a Miller Act issue in its complaint and that it is not the job of the Commission to "infer" particular claims that a party wishes to make. Further, NEP notes that the conversions of the Apartment Complexes were completed nearly a year ago, making the question as to the "reasonableness" of the conversions moot. NEP recounts that AEP Ohio filed an application for rehearing of the Commission's July 27, 2022 entry affirming the Stay Entry, which was denied by operation of law under R.C. 4903.10. AEP Ohio filed no appeal of this denial of the application for rehearing and cannot, according to NEP, now make an untimely appeal of the Stay Entry.

NEP agrees that AEP Ohio waived its Miller Act arguments by not properly asserting such a claim in its complaint. NEP points out that AEP Ohio's complaint specifically identified three counts and none of them referenced the Miller Act. NEP argues that such a pleading falls short of the notice pleading standards contained in the Ohio Rules of Civil Procedure. Finally, NEP asserts that the Miller Act is not applicable to conversions to master-metered configuration on private property. (Memo Contra at 20-30.)

{¶ 45} The Commission finds that AEP Ohio's fourth ground for rehearing is without merit. The Commission devoted only a single paragraph to this issue in the Opinion and Order because the Miller Act did not play a significant role in the pleadings of this case or at the evidentiary hearing. In its lengthy and thorough complaint, AEP Ohio clearly enumerated three counts: Count I – unlawful provision of noncompetitive electric service (Complaint at ¶¶ 76-87); Count II – violation of the Certified Territory Act (Complaint at ¶¶ 88-91); and Count III – unlawful provision of competitive retail electric service (Complaint at ¶¶ 92-95). Nowhere in the paragraphs of these specified counts is the Miller Act, R.C. 4905.20, or R.C. 4905.21, mentioned. Clearly AEP Ohio understood that it needed to identify the specific violations of law and/or regulations that it alleged NEP to have committed, yet it failed to include a count concerning the Miller Act. The Commission does not infer the arguments or claims that a sophisticated party appearing before it may desire to make. *In re the Complaint of Pat Nussle v. Ohio Power Co.*, Case No. 14-1659-EL-CSS, Opinion and Order (Jan. 15, 2020) at ¶ 51, citing *In re the Application of The East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 11-5843-GA-RDR, Entry on Rehearing (Dec. 12, 2012); *In re the Complaint of Cleveland Metropolitan School Dist. v. The Cleveland Elec. Illum. Co.*, Opinion and Order (Apr. 20, 2022) at fn. 4. The Miller Act violation was not properly pleaded in AEP Ohio's complaint and, based on this, the Commission denies this fourth assignment of error.

IV. ORDER

{¶ 46} It is, therefore,

{¶ 47} ORDERED, That AEP Ohio's Application for Rehearing filed on October 6, 2023, be denied. It is, further,

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

COMMISSIONERS:

Approving:

Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

DMH/dr

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

Summary: Entry on Rehearing denying the application for rehearing filed by Ohio Power Company on October 6, 2023 electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio.