BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Abandon Electric Service Lines, Pursuant to Ohio Revised Code Sections 4905.20 and 4905.21	))))	Case No. 22-693-EL-ABN

OHIO POWER COMPANY'S MEMORANDUM CONTRA
NATIONWIDE ENERGY PARTNERS, LLC'S MOTION TO DISMISS

Pursuant to Ohio Administrative Code ("OAC") 4901-1-12(B)(1), Ohio Power Company ("AEP Ohio") submits this Memorandum Contra the Motion to Dismiss ("Motion") filed by Nationwide Energy Partners, LLC ("NEP") in this proceeding on December 4, 2023.

I. INTRODUCTION

NEP's Motion casts this proceeding as an attempt by AEP Ohio to take a second bite at the apple of the questions raised in the recent submetering complaint case. *See Ohio Power Co. v. Nationwide Energy Partners, LLC*, Case No. 21-990-EL-CSS ("Complaint Case"). That characterization is erroneous. As described below, binding Ohio Supreme Court precedent demonstrates that the Miller Act claims AEP Ohio raises in this abandonment proceeding are totally separate from – and do not in any way depend upon – the Commission's recent rulings in the Complaint Case. Therefore, although AEP Ohio retains the right to appeal the decision to the Ohio Supreme Court, AEP Ohio will go forward in this proceeding assuming the validity of the Commission's rulings in the Complaint Case. Indeed, *even assuming that the Commission's entire decision in the Complaint Case is upheld on appeal*, this Miller Act Application raises a distinct, independent legal issue that the Commission must decide: The Commission must determine whether it is "reasonable" to order AEP Ohio to abandon its service to 283 public utility customers at the Northtowne complex.

As described more fully below, according to the Supreme Court, once AEP Ohio began serving the Northtowne residents 50 years ago, the Miller Act created a "nexus" between AEP Ohio and the Northtowne residential "load centers." Under the Miller Act, AEP Ohio can only be forced to withdraw its service to those individual load centers if the Commission deems this abandonment "reasonable" with due regard for the "welfare of the public." R.C. 4905.21. These indisputable legal principles defeat each of NEP's grounds for dismissal. It does not matter whether NEP or the Northtowne landlord, Preserve Partners, LLC ("Preserve"), are legally "entitled" to submeter either new load or existing load. Northtowne properties are *existing* load, and the Miller Act requires the Commission to approve the forced withdraw of service to existing load even where another entity would be taking over electric service. Thus, the Commission must go forward with this proceeding and hold a hearing to determine the reasonableness of the forced withdrawal of AEP Ohio's service to the 286 existing Northtowne residential loads. For these and the other reasons described below, NEP's Motion to Dismiss must be denied.

II. ARGUMENT

A. The Miller Act Applies Where, as Here, a Public Utility Is Being Forced to Withdraw Its Existing Electric Service in Favor of Another Entity That Will Take Over Serving That Load. (NEP's <u>First</u> Basis for Dismissal)

NEP's Motion misrepresents the nature of a Miller Act claim. NEP argues that there is no "abandonment," and thus the Miller Act does not apply, because in its view (Motion at 4), "this proceeding is about *how* AEP Ohio must provide service to Northtowne," not *whether* AEP Ohio will provide service to Northtowne. That is, NEP believes that because AEP Ohio would provide master meter service to the Northtowne landlord if the complex were converted to submetering, AEP Ohio would not be "abandoning" service to the complex but rather providing a different *kind* of service. This argument is factually wrong and legally unsound.

As a factual matter, conversion from individual-tenant service to master-meter service at Northtowne *would* involve an "abandonment" of customers and equipment under the Miller Act. Currently, AEP Ohio serves 286 residential customers at Northtowne. AEP Ohio also provides commercial service to Preserve, the Northtown landlord, for the electricity needs of common areas and other landlord load. If AEP Ohio were forced to convert Northtowne to submetering, the commercial landlord accounts would remain, but AEP Ohio would be forced to end its service to the 286 individual residences. The forced closure of 286 residential accounts is a forced "abandonment" of those accounts and the individual lines by which AEP Ohio provides service to those accounts.

As a legal matter, binding Supreme Court precedent makes clear that the forced withdrawal of public utility service to individual residential load centers requires Commission approval under the Miller Act. In *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St. 3d 508 (1996), the City of Clyde ordered public utility Toledo Edison to abandon its service within the city to enable the municipal utility to take over electric service to that same load. The Supreme Court held that the Miller Act applied to this forced takeover of electric service from Toledo Edison, and it held that the Miller Act required approval from the Commission before Toledo Edison could be forced to end its service to its existing customers.

In reaching that decision, the Supreme Court concluded that the Miller Act applies to "the abandonment or closure of *all* electric lines, regardless of size," even "single customer service lines." *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St. 3d 508, 511 (1996) (emphasis added). Here, AEP Ohio currently runs "lines" (and other service equipment such as meters and transformers) to 286 customers. The proposed conversion to submetering would "close" those 286 lines. That forced closure clearly falls within the scope of the Miller Act.

Moreover, *Clyde* makes clear that service continued in another form does not exempt the abandonment from Miller Act review. Indeed, in *Clyde*, the residential customers in question were not at risk of losing electric service because they would continue to receive electric service from the municipal utility if Toledo Edison were forced to abandon its service to them. That was, in fact, the entire point of the forced abandonment in *Clyde* – the City wanted to force out Toledo Edison so its municipal utility could take over.

The *Clyde* "takeover" scenario is precisely the same as what Preserve (and NEP) are attempting here. Just as the City and its municipal utility attempted to take over service from Toledo Edison, Preserve/NEP are seeking to force AEP Ohio to close its service to 286 individual customers at Northtowne so that Preserve/NEP can take over service to those same 286 individual customers under AEP Ohio's resale tariff. Thus, *Clyde* directly refutes NEP's claim that the Miller Act does not apply where service is switched from one source to another – the Miller Act clearly does apply in this scenario, as *Clyde* makes clear.

Clyde also undercuts all of NEP's conjectures (*e.g.*, Motion at 6) about what Preserve could have done in various counterfactual scenarios. *Clyde* teaches that under the Miller Act, timing matters. A key fact in *Clyde* was that the customers in question were *existing* customers that Toledo Edison had begun serving in the past and was currently serving at the time of the case. As *Clyde* explained, this was a crucial distinction because the Miller Act and its predecessor statute were "specifically enacted and have been used to protect *existing* utility facilities, utility consumers, and their utility providers." *Clyde*, 76 Ohio St. 3d at 514 (emphasis added); *see also id.* at 513 (explaining that "the Miller Act focuses on protecting *existing utility customers*" (emphasis added)). In contrast, *Clyde* also explained that the Miller Act does *not* protect a utility's right to serve *new* load. *Clyde* summarized the Miller Act as follows:

> Simply stated, the Miller Act protects the nexus between the utility provider and its existing facilities or load centers, binding them together in such a manner that only the commission can compel termination of that relationship. New facilities or load centers have no nexus to the public utility . . . .

Id. at 516.

When NEP puts forward counterfactual examples of what Preserve could have done with the Northtowne building (Motion at 6-7), NEP is running roughshod over the Miller Act's distinction between new and existing load. It is true that, if Northtowne were a *newly constructed building*, the Miller Act would not apply, and Preserve would not have to first seek Commission approval under the Miller Act to serve Northtowne residents. *See Clyde*, 76 Ohio St. 3d at 515 ("The [Miller] Act protects only *existing* facilities and the service rendered thereby." (emphasis added)). Here, however, when AEP Ohio first served the 286 Northtowne residences 50 years ago, the Miller Act create a "nexus" between AEP Ohio and those load centers, "binding them together in such a manner that only the commission can compel termination of that relationship." *Clyde*, 76 Ohio St. 3d at 516. Thus, NEP's analogy to serving new load is inapplicable.

Clyde also disposes of NEP's counterfactual scenario in which Preserve decides to "maintain all resident accounts at Northtowne in its [own] name." (Motion at 6.) As an initial matter, Preserve has not done this or signaled any desire to do this, so there is no need to address this hypothetical scenario. Even if Preserve were to put all 286 accounts in its own name but reconfigured the service from individually metered to master metered, that would not diminish AEP Ohio's rights under the Miller Act.

As *Clyde* expressly held, "[the utility's] existing electric lines do not become unprotected by the Miller Act merely because the name on the bill changes." *Clyde*, 76 Ohio St. 3d at 515. Rather, as *Clyde* instructs, the Miller Act protects AEP Ohio's interest in the "service line itself,"

regardless of whose name is on the accounts. *See id.* ("Termination of the current utility/customer relationship does not alter the fact that the *service line itself* is protected by the [Miller] Act." (emphasis added).) Thus, even if, hypothetically, Preserve were to switch all residential accounts to its own name but reconfigured the service to being master metered, Preserve would still need Commission approval under the Miller Act to force AEP Ohio to abandon those lines. As *Clyde* explains, the Miller Act would protect AEP Ohio's right to continue to serve each individual "service line," 76 Ohio St. 3d at 515, and Preserve would be required to pay each individual AEP Ohio residential bill. Therefore, because AEP Ohio currently provides service lines and other distribution equipment to serve the 286 individual residential load centers at Northtowne, AEP Ohio cannot be forced to abandon those load centers (no matter the names on the accounts) unless the Commission approves the abandonment under the Miller Act. *See id.* at 511 (clarifying that the Miller Act applies to "the abandonment or closure of all electric lines, regardless of size," even "single customer service lines"). In any case, NEP's counterfactual hypothetical examples are not presented for decision and have no relevance to this proceeding.

B. The Right of Landlords to Submeter Under Ohio Law or AEP Ohio's Tariff Does Not Change the Fact That the Miller Act Requires the Commission to Approve the Forced Withdraw of Public Utility Service from Existing Load. (NEP's Second and Third Bases for Dismissal)

NEP argues that landlords have "an unequivocal right" to submeter their building under Ohio law and AEP Ohio's tariff. (*See* Motion at 22.) NEP also attempts to rely on the Commission's recent decisions in the Complaint Case about the legality of submetering. (Motion at 23-24.) Yet all these arguments about the legality of submetering miss the point of the Miller Act. *Clyde*'s distinction between existing and new load under the Miller Act makes NEP's assertions about the legality of submetering irrelevant. Moreover, the decision in the

Complaint Cases dismissed AEP Ohio's Miller Act allegations without being considered, in part because no separate abandonment application was filed for the apartment complexes at issue in the Complaint Cases. *Complaint Cases*, Opinion and Order at ¶ 231. So there is no basis to conclude that the Complaint Cases decision disposes of this abandonment application under the Miller Act.

Even if it is true that Preserve (and NEP) are legally entitled to submeter and serve the 286 Northtowne residences, that means that Preserve (with NEP) could have legally submetered the residences when they were *new load*. Alternatively, it means that Preserve (with NEP) would be legally entitled to submeter the residences *if the Commission eventually approves the abandonment application here*. But it does not mean that the Miller Act abandonment inquiry is somehow cancelled. Because the Northtowne residences are AEP Ohio's *existing load*, "the Miller Act protects the nexus between" AEP Ohio and "its existing facilities or load centers" at Northtowne, "binding them together in such a manner that only the commission can compel termination of that relationship." *Clyde*, 76 Ohio St. 3d at 516.

Put differently, there was no question in *Clyde* that, apart from the Miller Act, the municipal utility in *Clyde* was otherwise "permitted by law" to serve the customers in the City, just as NEP claims that Preserve (and NEP) would be permitted by law to submeter and serve the 286 residential customers at Northtowne. *See Clyde*, 76 Ohio St. 3d at 511 (explaining that the City of Clyde was authorized to create a municipal utility under Article XVIII, Section 4 of the Ohio Constitution, but this power was limited by "statewide police power limitations" that included the Miller). Likewise, there was no question in *Clyde* that Toledo Edison was "permitted by law" to serve (and was currently serving) the same residential customers, *see id.* at 512, just as AEP Ohio is permitted by law to serve (and is currently serving) the 286 residential

customers at Northtowne. Yet in *Clyde*, the fact that the municipal utility was otherwise "permitted by law" to serve the customers did not foreclose the application of the Miller Act. Thus, *Clyde* teaches that the Miller Act applies any time there is an existing "nexus" between a public utility and existing load, and that is true even if the load will be legally served by another entity after conversion.

D. Conversion to Submetering Would Clearly Involve the Compelled Termination of the Existing Nexus Between AEP Ohio and Its Existing Equipment or Load Centers at Northtowne. (NEP's Fourth Basis for Dismissal)

NEP offers several criticisms of AEP Ohio's planned service configuration to the Northtowne complex if the Commission orders AEP Ohio to convert the complex to submetering. (Motion at 18-19.) Specifically, if conversion is ordered by the Commission, NEP would like AEP Ohio to provide secondary service through 59 points of delivery with 59 "master meters" at the numerous buildings at the Northtown property. For one thing, this line of argument involves factual disputes that are inappropriate for a motion to dismiss and should be resolved only after the Commission receives evidence from the parties in a hearing. (This is shown by the fact that NEP attempts, improperly, to attach an email as an exhibit, which is plainly a factual matter beyond the scope of a motion to dismiss.) For another thing, NEP's complaints about AEP Ohio's proposed post-conversion service configuration are difficult to understand given that the "master meter" language in AEP Ohio's tariff (which NEP frequently relies on, *see, e.g.*, Motion at 23) states that the landlord "shall have the choice of providing separate wring 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*." AEP Ohio Tariff Terms and Conditions ¶ 21 (emphasis added). The tariff does not contemplate 53

master meters at the property, as NEP wants. It contemplates "a single meter," and that is what AEP Ohio's post-conversion "service plan" entails.

In any event, NEP's squabbling about the post-conversion configuration is irrelevant to the Miller Act inquiry. As noted above, *Clyde* holds that the Miller Act recognizes a "nexus" between the public utility and its existing "load centers." *Clyde*, 76 Ohio St. 3d at 516. *Clyde* also expressly holds that the Miller Act applies to "the abandonment or closure of *all* electric lines, regardless of size," even "single customer service lines." *Id.* at 511. As explained above, there is currently a "nexus" between AEP Ohio and all 286 residential load centers in the Northtowne Complex, and that "relationship" can only be terminated by the Commission after it holds a hearing under the Miller Act. AEP Ohio currently runs "lines" (and other service equipment such as meters) to 286 customers, and the proposed conversion to submetering would "close" those 286 lines. That forced closure clearly falls within the scope of the Miller Act.

III. CONCLUSION

For the foregoing reasons, NEP's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 19th day of December 2023, via electronic transmission.

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Summary: Memorandum Memo Contra, NEP Motion to Dismiss. electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company.