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. 22-0693-EL-ABN**

NATIONWIDE ENERGY PARTNERS, LLC'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Rule 4901-1-12(B)(2) of the Ohio Administrative Code, Nationwide Energy Partners, LLC ("NEP") submits this Reply to Ohio Power Company's (AEP Ohio's) Memorandum Contra filed in this proceeding on December 19, 2023.

I. INTRODUCTION

AEP Ohio's Memorandum Contra NEP's Motion to Dismiss demonstrates beyond a doubt that AEP Ohio's Application should be dismissed. AEP Ohio insists that it does not seek "a second bite at the apple of the questions raised" in the Complaint Case, yet it continues to ask the Commission to insert itself into the landlord-tenant relationship. (AEP Ohio Mem. Contra at 1) Rather than refuting the arguments made in NEP's Motion to Dismiss, AEP Ohio's Memorandum Contra misleads the Commission about basic facts and contorts the language of statutes and Supreme Court decisions to bridge the gap between what AEP Ohio wants and what the law provides. AEP Ohio's Memorandum Contra fails to address *at all* the plain language of the Miller Act that renders the conversion of Northtowne to master-metered service outside the scope of the Act, a discussion of which occupies a half-dozen pages of NEP's Motion to Dismiss. AEP Ohio's

inability to engage with that discussion, the law as written and the facts at Northtowne reveals just how far its Application attempts to stretch – and sometimes rewrite – the law.

Notwithstanding the facts manufactured by AEP Ohio in its Memorandum Contra, the Commission only needs to engage with the law to substantively address NEP's Motion to Dismiss. NEP's Motion to Dismiss properly raises these issues for the Commission's consideration, and the Commission should simply render a decision on the law as written. For the reasons stated herein and in NEP's Motion to Dismiss, the Miller Act could not possibly apply to the requested conversion of Northtowne to master-metered service. Even if the Commission found that it was possible, the facts make clear that the Miller Act *does not* apply. In any event, AEP Ohio's Application has been improperly filed and must be dismissed.

II. ARGUMENT

AEP Ohio's Memorandum Contra plays a shell game with the language of the Act. The Miller Act only applies to "any . . . electric light *line* . . . or any portion thereof . . . or the *service rendered thereby*, that has once been . . . *used for public business*." R.C. 4905.20 (emphasis added). AEP Ohio's Application and Memorandum Contra repeatedly insist that AEP Ohio would "abandon" "meters," "accounts," "customers" and "equipment" in an apparent attempt to conflate those things with the "electric light *line[s]*" covered by the Act.[1] But the Act does not mention "meters," "accounts," "customers" or "equipment," and none of these things are "lines." In construing a statute, "courts may not delete words used or insert words not used." *In re Collier* (1993), 85 Ohio App. 3d 232, 237. The legislature carefully drafted the Miller Act and the words

[1] *See, e.g.*, AEP Ohio Mem. Contra at 3 ("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.") (emphasis in original).

it chose have meaning. The Miller Act does not dig a moat around utilities' meters, customers, accounts or equipment. Even if it may do so on private property against the will of the owner of that property (it may not), AEP Ohio can only protect what the Miller Act actually addresses – *lines* and the service provided by those *lines*.

Perhaps understanding that the facts at Northtowne do not trigger the Act, AEP Ohio's Memorandum Contra simply makes up new facts. AEP Ohio insists that "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." (AEP Ohio Mem. Contra at 3)(emphasis added). Later, AEP Ohio asserts *twice* that "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*." (Id. at 3, 9)(emphasis added). **But there are <u>not</u> 286 AEP Ohio lines running to individual tenants at Northtowne.** AEP Ohio's existing service lines at Northtowne connect to Preserve's private infrastructure, which distributes electricity to individual tenants in each building. AEP Ohio's lines end at Preserve's meter stacks outside of each building, and AEP Ohio's meters are installed on equipment owned by Preserve. It is concerning that AEP Ohio would assert that its *lines* serve each tenant, at best, without investigating whether that is true.

The Commission should note that AEP Ohio's factual misrepresentations, while ultimately immaterial, are not innocent. Even if the Commission accepts every single one of AEP Ohio's legal propositions and ignores NEP's arguments to which AEP Ohio has no response (it should not), the best-case-scenario decision for AEP Ohio would hold that it may continue operating every inch of *lines* it currently operates on Northtowne's property and put a meter at the end of those *lines*. Nothing in the Miller Act supports AEP Ohio's ability to place *meters* on private equipment against the will of the owner of that private equipment. *If* AEP Ohio really did have lines serving

each tenant, the result of that best-case-scenario decision would be what AEP Ohio desires here – 286 residential meters attached to each unit. However, under the facts as they are, the result would be 59 commercial meters attached to the end of each AEP Ohio service line, which is exactly what Preserve (through NEP as its agent) requested eighteen months ago. AEP Ohio refused to let the facts get in the way of the story it is trying to spin, and its falsehoods are directed at materially advancing its cause in this proceeding. That AEP Ohio resorted to fabrications should tell the Commission all it needs to know about the soundness of its novel Miller Act theory.

Further, AEP Ohio's Memorandum Contra wholly relies on *State ex rel Toledo Edison v. Clyde* (abbreviated as "*State ex rel Toledo*" by NEP and as "*Clyde*" by AEP Ohio) as "binding Supreme Court precedent." (AEP Ohio Mem. Contra at 1.) But that case both (a) is not binding under any version of the facts presented here and the plain language of the Miller Act, and (b) has been distinguished by the Court itself in a manner inapposite to AEP Ohio's arguments. AEP Ohio completely fails to address either of these facts that render *State ex rel Toledo* merely interesting, but in no way binding.

Critically, *State ex rel Toledo* did not involve a change of service on private property or the meaning of the words "used for public business" in the Miller Act and is therefore **not binding** in this proceeding. NEP predicted in its Motion to Dismiss that AEP Ohio would rely heavily on *State ex rel Toledo*, and explained that "the facts in that case and issues *not* addressed render its holding of little import here." (Motion at 18.) NEP hereby restates and incorporates those sections of its Motion to Dismiss by reference. NEP's Motion to Dismiss devotes a half-dozen pages to the argument that the plain language of the Miller Act applies only to "lines…*used for public business*" and that AEP Ohio's lines laying exclusively within Northtowne's private property are therefore outside the scope of the Miller Act. (Id. at 14-21.)

Incredibly, AEP Ohio's Memorandum Contra does not mention this argument or the words "used for public business" *at all*. That is, the language is **right there in the statute**, NEP's Motion to Dismiss thoroughly explained how this language renders the conversion of Northtowne to master-metered service outside the scope of the Miller Act and therefore mandates dismissal of the Application, and AEP Ohio **dodges the issue entirely**. As NEP noted in its Motion to Dismiss, "[t]he Miller Act is simply irrelevant to any property owner's request for a utility to alter its service or metering configuration on their own property." (Motion at 15.) If AEP Ohio disagrees, it should have explained why.

In fact, if the words "used for public business" do not limit the scope of the Miller Act to the property line and protect the decisions of private property owners on their own property, then they would have no meaning at all. Courts "must give effect to the words used" in a statute and "may not delete words used or insert words not used." *In re Collier, supra.* As the Commission recently found: "[C]ontrary to AEP Ohio's claims otherwise, a landlord who is not operating as a public utility that redistributes or resells electric service through submetering to its tenants is the ultimate consumer contemplated under R.C. 4905.03(C).…**[T]he Commission's jurisdiction ends at this point and does not extend to a landlord's reselling of that electricity to its tenants**." *Ohio Power Company* Opinion and Order (September 6, 2023) at ¶ 194 (emphasis added). The scope of the Miller Act and the Commission's jurisdiction should be (and are) concurrent and coterminous. The words "used for public business" constrain the Miller Act to the exact point that the Commission's jurisdiction ends: at the property line. The Commission must give effect to those words, and in doing so must dismiss the Application.

Of course, the Commission's jurisdiction does include determining whether *the utility's* actions are reasonable in providing master-metered service, which it has already done when it

approved AEP Ohio's tariff governing how this service is to be provided. The Commission has already exercised its judgment that service complying with the tariff is reasonable. Any interpretation of the Miller Act that would either (a) require the Commission to revisit this judgment on a case-by-case basis or (b) impose a pointless administrative obligation on the Commission to mechanically approve abandonment applications as "reasonable" where service complies with the tariff is meritless and should be rejected. The Miller Act simply does not apply to changes in tariffed service on private property.

AEP Ohio also fails to address the fact that *State ex rel Toledo* was subsequently distinguished and limited by the Court in *Grafton v. Ohio Edison Co.*[2] NEP's Motion to Dismiss explained how *Grafton* held that **not all service lines are subject to the Miller Act** and that the Act's application is guided by its express legislative purpose. *Grafton* soundly refutes AEP Ohio's theory of the Miller Act as a weapon to be wielded by public utilities against customers. And yet, ignoring *Grafton* and NEP's arguments, AEP Ohio's Memorandum Contra repeatedly cites to *State ex rel Toledo* to support the proposition that all service lines are subject to the Miller Act regardless of the purpose of the Act. In doing so AEP Ohio has hitched its whole argument to a misstatement of the law.

AEP Ohio's Memorandum Contra attempts another sleight of hand in addressing each residential tenant at Northtowne as a "load center."[3] The Court in *State ex rel Toledo* found that

[2] 77 Ohio St. 3d 102, 109, 1996-Ohio-336, 671 N.E.2d 241 (1996)

[3] *See* AEP Ohio Mem. Contra at 2 ("…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'…"); at 5 ("…when AEP Ohio first served the *286 Northtowne residences* 50 years ago, the Miller Act create [sic] a 'nexus' between AEP Ohio and those *load centers*…"); at 6 ("Therefore, because AEP Ohio currently provides services 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*…"); at 9 ("As explained above, there is currently a 'nexus' between AEP Ohio and all *286 residential load centers* in the Northtowne complex…").

"the Miller Act protects the nexus between the utility provider and its existing *facilities or load centers*." *State ex rel Toledo* at 516. That Court did **not** find that the Miller Act protects the nexus between AEP Ohio and each apartment tenant. Given its total reliance on *State ex rel Toledo*, AEP Ohio simply conflates "tenants" and "load centers," but AEP Ohio is wrong.

The residential tenants at Northtowne are not the "load centers" that *State ex rel Toledo* addresses – the *buildings* are. That Court addressed both the Miller Act and the Certified Territory Act (R.C. 4933.81 to 4933.90; the "CTA"), of which the term "electric load center" is a critical component. In addressing the meaning of "electric load center" in the CTA, the Supreme Court of Ohio explained in *Union Rural Elec. Coop., Inc. v. Pub. Util. Comm*:[4]

> "R.C. 4933.81(E) defines "electric load center" as:
>
> "* * * all the electric consuming facilities of any type or character owned, occupied, controlled, or used by a person at a single location which facilities have been, are, or will be connected to and served at a metered point of delivery and to which electric service has been, is, or will be rendered."
>
> "The General Assembly did not provide a definition for 'electric consuming facilities.' The commission, in general, construed this phrase to mean **buildings, structures, installations, or other man-made improvements that are served by electricity**…In sum, we find the commission's construction of 'electric consuming facilities,' and the findings made pursuant thereto, to be appropriate in all respects." (emphasis added)

As above, even if the Miller Act extended the Commission's jurisdiction to the decisions of private property owners on their own property (it does not), the maximum theoretical extent of the Miller Act would be to protect AEP Ohio's ability to continue operating its *lines* that serve "load centers." While AEP Ohio insists that it has *lines* running to each tenant and that each tenant is a "load center," the reality is that AEP Ohio only has lines running to buildings and that the

[4] 52 Ohio St. 3d 78 (Ohio 1990) 555 N.E.2d 641 at 79 – 81.

buildings are the "load centers." AEP Ohio's attempt to fill the gap between what the Miller Act and *State ex rel Toledo* say and the outcome it wants is both factually and legally untenable.

Similarly, AEP Ohio's Memorandum Contra falsely equates its *quantity of meters* with "load." In its Section B, AEP Ohio attempts to circumvent the fact that landlords have an unequivocal right to receive master metered service under both the law and AEP Ohio's tariff by asserting that the Miller Act limits that right to "new load," at least without an abandonment proceeding. AEP Ohio argues that "[b]ecause 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" (AEO Ohio Mem. Contra at 7) (emphasis in original). But this argument is irrelevant – while its quantity of meters and the location of those meters will change, **AEP Ohio will continue to serve the exact same existing load**. The service requested at Northtowne would leave the "nexus" to which the *State ex rel Toledo* Court referred completely intact.

Finally, AEP Ohio's Memorandum Contra takes a pass at suggesting that its "my way or the highway" approach to the service configuration at Northtowne is not only justified, but required by its tariff. AEP Ohio asserts that "[t]he 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." (AEP Mem. Contra at 8-9.) AEP Ohio believes that if it does not have to provide master-metered service in accordance with its "service plan," then it does not have to provide master-metered service at all. This is false for two reasons. First, Section 13 of AEP Ohio's tariff provides:

> "The Company has established nominal service voltages of 60 cycle alternating current of which **at least one (1)** of the following characteristics **shall be made available** to a customer in each category, the particular voltage and service characteristics to be at the option of the Company **based on what is technically feasible** at the location:

> "Secondary Distribution System - Nominal regulated voltages of 120, 120/208, 120/240, or 240/480 volts, single phase and 120/208, 120/240, 240, 240/480, 277/480 and 480 volts, 3 phase.
>
> "Primary Distribution System - Nominal regulated voltages of 2,400, 2,400/4,160, 4,160, 7,200, 7,200/12,470, 7,620/13,200, 7,970/13,800 and 19,900/34,500 volts, 3 phase.
>
> "Transmission - Nominal, unregulated voltages of 23,000, 34,500, 40,000. 69,000, 138,000, 345,000, and 765,000 volts, 3 phase." (emphasis added)

AEP Ohio's "service plan" involves providing a single meter at primary voltage to the edge of the property. If, for whatever reason, that service is not made available to Northtowne, then AEP Ohio **shall** make another service available based on what is **technically feasible**. Because AEP Ohio cannot argue that either (1) the secondary master metering solution proposed by Preserve, or (2) a primary service involving the sale of AEP Ohio's equipment to Preserve are not *technically feasible* (both plainly are), AEP Ohio **shall** make one of those services available. Second, AEP Ohio already provides secondary master-metered service to many apartment communities in its service territory, demonstrating both that (a) the solution proposed by Preserve is technically feasible, and (b) that AEP Ohio would unlawfully discriminate against Preserve by refusing to furnish that service without providing an alternative. However, this whole discussion is ultimately immaterial, at least in this proceeding, because any service change on private property that does not affect "lines…used for public business" is outside the scope of the Miller Act and the Application must be dismissed.

AEP Ohio's numerous misstatements in support of its attempt to hijack the Miller Act to avoid providing – or at least make painful for customers – service it does not want to provide all point to the central problem with its Application: AEP Ohio cannot present a coherent theory of what the Miller Act actually does that harmonizes with existing law. It cannot even address the

meaning of the words "used for public business." It cannot explain how the Commission would be vested with jurisdiction to determine whether a landlord's choice to receive master-metered service and resell service to tenants is "reasonable" when "the Commission's jurisdiction…does not extend to a landlord's reselling of…electricity to tenants." *Ohio Power Company*, Opinion and Order (September 6, 2023) at ¶194. AEP Ohio even apparently believes that the Commission could "decline to give effect to" certain lease provisions as "void against public policy." (AEP Ohio Reply Comm. at 8.) But the Commission's limited jurisdiction prevents it from even beginning this inquiry. This has been settled for more than a century:

> "The public utilities commission is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights. **The Miller act does not purport to confer such power upon the public utilities commission, and if it did so in any of its terms it would be to that extent invalid.**" *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921) at 31. (emphasis added)

Landlords-tenant relationships are governed by landlord tenant law, not the Miller Act. The General Assembly has expressly stated that it "… finds and declares that Chapter 5321 of the Revised Code is a statewide and comprehensive legislative enactment regulating **all aspects of the landlord-tenant relationship** with respect to residential premises." R.C. 5321.20 (emphasis added). AEP Ohio believes that the Commission may nonetheless conduct a hearing to take evidence from landlords and tenants in order to decide for itself whether their contracts should be performed. But it cannot explain the source of the Commission's jurisdiction to do so, nor can it resolve the resulting conflict with Chapter 5321. And, AEP Ohio cannot explain why it has never filed a similar application before, either where landlords have changed from residential service to commercial service or vice versa.

AEP Ohio dismisses NEP's "counterfactual hypothetical examples" that demonstrate the absurd results at the logical extent of its expansive Miller Act theory as having "no relevance to

this proceeding." (AEP Ohio Mem. Contra at 6.) But the Commission should carefully consider where AEP Ohio's reasoning leads. Failure to dismiss the Application will hand Ohio's public utilities a weapon with which to interfere in any customer's private service decision that the utility does not like.

A hearing is only necessary if there are material facts in dispute. A hearing to adduce evidence as to whether an "abandonment" subject to the Miller Act has occurred, and thus whether an application for abandonment is proper, and a hearing *under* the Miller Act to determine whether such an "abandonment" is reasonable are very different hearings and should not be confused. But, ultimately neither is necessary. The Commission should view AEP Ohio's request for what it is – another obstruction tactic to deny landlords the very rights this Commission has already determined they have to master-meter their properties – and dismiss the Application. A hearing would merely create additional unnecessary delay.

III. CONCLUSION

AEP Ohio will continue pressing its novel Miller Act theory until the Commission disposes of it, and the Commission should answer the questions of law properly before it here. Critically, the Commission should address (a) the meaning of the words "used for public business" and their effect on the scope of the Act, (b) whether an "abandonment" occurs even though the utility will continue to serve the exact same load and nobody will be left without service, (c) whether things not mentioned in the Act (i.e. meters, accounts, customers and equipment) are nonetheless "lines" for purposes of the Act, (d) whether the Miller Act expands the Commission's jurisdiction to address and potentially invalidate landlords' and tenants' private agreements, and (e) whether the Commission may reexamine issues governed by a utility's tariff on a case-by-case basis.

NEP's Motion to Dismiss and this Reply present a coherent set of answers to all of these questions based on the plain wording of the Miller Act, a century of its interpretation, and its express legislative intent. A holding that affirms changes in *how* a utility provides service on private property are outside the scope of the Act would also (1) give effect to the plain wording of AEP Ohio's Commission-approved tariff, (2) avoid conflict with Supreme Court and Commission precedent affirming the rights of landlords to receive master-metered service, (3) preserve landlords' and tenants' freedom to contract, (4) jibe with the definition of "load center" in the Certified Territory Act, and (5) harmonize the Commission's statutory jurisdiction and the jurisdiction of state courts over landlord-tenant issues. Incidentally, NEP's answers are also consistent with the past practices of Ohio's public utilities from which AEP Ohio seeks to depart. AEP Ohio's position as expressed in its Application and Memorandum Contra cannot be squared with any of the above, but would substantially empower Ohio's public utilities to interfere in their customers' private decisions and force customers into endless litigation at the Commission. The Commission should dismiss the Application and permanently disabuse AEP Ohio of this incoherent and dangerous construction of the Miller Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the Public Utilities Commission of Ohio's e-filing system will electronically serve a copy of this filing on all parties referenced in the service list of the docket who have electronically subscribed to this case. In addition, a service copy of this filing has been served on the parties of record at the email addresses listed below on December 26, 2023.

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Summary: Reply in Support of Motion to Dismiss electronically filed by Mr. Drew B. Romig on behalf of Nationwide Energy Partners, LLC.