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. 23-0563-EL-ABN**

MOTION TO DISMISS OF NATIONWIDE ENERGY PARTNERS, LLC

Pursuant to Rule 4901-1-12 of the Ohio Administrative Code, Nationwide Energy Partners, LLC ("NEP") respectfully requests that the Public Utilities Commission of Ohio issue an order dismissing the Application for Abandonment of Ohio Power Company ("AEP Ohio"). AEP Ohio's application has been improperly filed because (1) changes in *how* service is provided on private property do not cause an "abandonment" that triggers the Miller Act; (2) Landlords have an unequivocal right to receive master-metered service under long-standing Ohio Supreme Court precedent and AEP Ohio's own Commission-approved tariff; (3) the Commission's recent decision in the Complaint Case confirms that the Commission cannot interfere in the landlord-tenant relationship, and (4) AEP Ohio has forfeited any protections the Miller Act may have offered by agreeing to perform the requested work and inducing NEP and Edwards to rely on its representations. This motion is supported by the attached memorandum in support.

Respectfully submitted,

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

I. INTRODUCTION

In this proceeding, Ohio Power Company dba AEP Ohio ("AEP Ohio") has improperly filed the third of three first-of-their-kind applications (the "Application") for abandonment "to seek the Commission's ruling under the Miller Act" with respect to whether it must provide master-metered service under its tariff to the Fisher Commons apartment complex owned by The Edwards Companies ("Edwards") in partnership with The Ohio State University ("OSU"). Application at ¶12. To be clear, this proceeding is about *how* AEP Ohio must provide service to Fisher Commons. Edwards has contracted with Nationwide Energy Partners, LLC ("NEP") to perform services related to the master-metering of Fisher Commons in a negotiated and mutually beneficial contract. Because the Miller Act *cannot* apply to a customer's service request on their own property, the Application has been improperly filed and NEP hereby moves the Commission to dismiss the Application.

The Commission can only do three things with AEP Ohio's Application: dismiss it, grant it, or deny it (or any of those in part or in combination). If Fisher Commons' change from residential units service to commercial master-metered service would not cause an "abandonment" subject to the Miller Act, then the Commission must dismiss the Application and analyzing whether that service change is "reasonable" would be unnecessary and improper. It simply would not make sense to grant or deny an Application for Abandonment, finding that "abandonment" reasonable or unreasonable, when there is no abandonment in the first place. This strictly legal question is the subject of this Motion to Dismiss.

The central thesis of the Application can be easily disposed of. AEP Ohio submits that NEP "engages in the resale or redistribution of public utility services in AEP Ohio's service territory in violation of Ohio law." Application at ¶ 6. **This is false**. In its September 6, 2023 Opinion and Order in Case No. 21-0990-EL-CSS (the "Complaint Case"), the Commission thoroughly analyzed NEP's services at five apartment complexes, which are substantially similar to the services that will be provided by NEP to Edwards at Fisher Commons, and conclusively determined that "the landlords and **not NEP** supply electricity to tenants under the terms of the leases on their own property, as already **permitted by law.**" *In the Matter of the Complaint of Ohio Power Company v. Nationwide Energy Partners, LLC*, Commission Case No. 21-0990-EL-CSS, Opinion and Order dated September 6, 2023 at ¶ 207 (emphasis added). Because AEP Ohio has not produced, and cannot produce, any fact or argument that would distinguish Fisher Commons from the five apartment complexes at issue in the Complaint Case, the Commission's Opinion and Order in that case is controlling here – the conversion of Fisher Commons is perfectly legal and neither (a) NEP's services to Edwards nor (b) Edwards' services to tenants are within the Commission's jurisdiction. *Id.* at ¶ 179.

The Application asserts that "AEP Ohio opposes the practice of converting existing customers to master-metered service whereby the existing AEP Ohio customers cease to be AEP Ohio customers and instead become customers of a third-party submetering company offering electric distribution services." Application at ¶ 7. As above, Fisher Commons' tenants will not be "customers" of NEP, but will purchase electricity from their landlord, Edwards, who will purchase that electricity from AEP Ohio. It appears that AEP Ohio has filed this Application to dispute whether tenants can agree to relinquish their AEP Ohio accounts, and that it has tried to hijack the Miller Act to prevent that scenario. But, importantly, that scenario is both possible and beyond the

Commission's jurisdiction to prohibit even if Fisher Commons remains individually-metered under a residential rate schedule for each of its units. Nothing prevents landlords and tenants from arranging for each individual unit's electric utility account to remain in the landlord's name, with the landlord paying the bills to the utility. In fact, this arrangement is common, particularly in student housing.

Indeed, tenants only have utility accounts with AEP Ohio in the first place because their landlord made that determination, and Edwards could decide at any time to maintain all resident accounts at Fisher Commons in its name. Once leases or amendments detailing that arrangement were signed, AEP Ohio would only have one customer at Fisher Commons, albeit with many accounts. If that one customer – Edwards – then chose to consolidate its residential service accounts into one big commercial service account, what could be the argument that any "abandonment" occurred? That scenario is effectively identical to the case at hand – all tenants have agreed to receive service from their landlord, which has a right to receive master-metered commercial service from AEP Ohio. **No service will be "abandoned," Fisher Commons will simply switch the units from residential service to master-metered commercial service.**

AEP Ohio has filed this Application (and maintained it following the Commission's decision in the Complaint Case) to test another novel hypothesis designed to interfere with its customers' right to make service decisions on their own property. AEP Ohio's new scheme relies on self-sabotaging the abandonment process designed to protect customers in order to use that process as a weapon against them. The Application paradoxically requests authority to "abandon" service, but then argues that granting that authority would be "unreasonable" and that the Commission should deny AEP Ohio's own request. AEP Ohio's double-talk demonstrates its

misapplication of the Miller Act and that its farcical Application has been improperly filed and should be dismissed.

While converting Fisher Commons to master-metered service is eminently reasonable (addressed in the Comments filed simultaneously herewith), the Commission need not – and cannot – reach that issue. The law is clear that landlords have a right to take master-metered commercial service at their communities. *See Jonas v. Swetland*, 119 Ohio St. 12, 162 N.E. 45, (1928); *Shopping Cent'rs Ass'n v. Public Util. Comm.*, 3 Ohio St. 2d 1, 1-5, 208 N.E. 2d 923 (1965); *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, (2002); *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, (2006); *See also Ohio Power Company, supra*. AEP Ohio agreed in the Complaint Case that neither AEP Ohio nor the Commission could abrogate that right. *See, e.g.* AEP Ohio Init. Br. at P. 87 ("Supreme Court precedent such as *Jonas* and *Pledger* recognized that landlords reselling utility service on their own property are not "public utilities" under R.C. 4905.02 and R.C. 4905.03, and AEP Ohio is not, of course, asking the Commission to overturn these cases."). That service is available under AEP Ohio's tariff and the Miller Act simply has nothing to say about changes in tariffed service on private property. Edwards has requested that service, and AEP Ohio must provide it – full stop.

The Commission should reject – and permanently foreclose – AEP Ohio's attempt to open a loophole in its otherwise unambiguous obligations by finding that the Miller Act does not apply to changes in *how* service is provided on private property and by dismissing the Application as improperly filed.

II. BACKGROUND

Edwards is a "privately held and nationally recognized family-owned corporation that acts as a holding company for numerous operating companies engaged in the businesses of mixed-use urban development, multi-family home building and management, student housing building & management, land development & construction, and condominium development."[1] NEP provides construction and energy management services for property owners, managers and developers of apartment complexes and condominium buildings. On June 17, 2021, NEP and Edwards (through its subsidiary) executed a contract which designates NEP as Edwards' agent to interface with AEP Ohio and manage the conversion of the Fisher Commons complex to master-metered service.[2] That contract also contemplates NEP's provision of a variety of post-conversion services to Edwards on an ongoing basis. Whether NEP and Edwards are able to perform their obligations under that contract and realize the benefits of that contract depend entirely upon AEP Ohio performing its obligations under its tariff and completing the requested conversion to master-metered service.

On July 21, 2021, NEP (on Edwards' behalf as its agent) requested that AEP Ohio provide a single master-metered service location on the Fisher Commons property. AEP Ohio did not initially raise any objections to the requested service, and indeed directed NEP, Edwards and OSU on what would be required to facilitate the conversion to master-metered service. On August 24, 2021, NEP (as Edwards' agent) and AEP Ohio executed a contribution in aid of construction (CIAC) agreement whereby AEP Ohio agreed to "install new three phase overhead primary meters

[1] http://www.edwardscompanies.com/

[2] Edwards has also nominated NEP as its agent through AEP Ohio's own Customer Letter of Authorization to Release Information and Conduct Account Activity, which designates NEP as Edwards' "Account Agent and Billing Agent" authorized to conduct "[a]ll activity and transactions, including receiving bills and remitting payments."

to meet customers needs. Aep [sic] to make all final connections. And then to remove Aep existing facilities once energized." NEP (as Edwards' agent) paid the $9,134.92 CIAC charge required by that agreement shortly thereafter. NEP will gladly provide the Commission with a copy of that agreement and the accompanying engineered drawings signed by AEP Ohio upon request. NEP and Edwards have since invested over $196,000 in equipment and labor in reliance on the CIAC agreement and AEP Ohio's representations that it would move forward with the conversion.

Simultaneously, AEP Ohio initially complied with its tariff and performed its side of the project, working with NEP and Edwards to move the project toward completion. With Edwards' private system ready to energize, AEP Ohio installed its primary service pole and primary meter in early March of 2023. Worth noting is that AEP Ohio filed its application in the Northtowne Case on July 11, 2022, and was still completing work on the Fisher Commons site *eight months later*. The parties were scheduled to meet to coordinate final conversion on March 30, 2023. However, AEP Ohio cancelled that meeting without explanation, and did not communicate with NEP or Edwards until May 12, when it informed NEP and Edwards that it would file the abandonment application in this proceeding, which it filed on May 19, 2023. That is, almost two years after the initial request was submitted, after all construction was paid for and completed by NEP and Edwards, and with the project requiring only several hours' work on AEP Ohio's part to energize, AEP Ohio abruptly stopped all communication. After six weeks of silence, in response to repeated requests to schedule completion of the project, AEP Ohio responded by filing its Application in this case. On June 27, 2023, Edwards informed NEP that it had filed an informal complaint against AEP Ohio with the Commission. Over the following months, Edwards informed NEP that AEP Ohio never responded to that complaint despite Commission staff reaching out and

despite its obligations under the Commission's rules (OAC 4901:1-10-21). The project remains 99% complete with only a few hours work on AEP Ohio's part remaining to energize.

As Fisher Commons' landlord, Edwards has entered into private lease agreements with every resident at Fisher Commons. NEP ensures that its landlord clients insert language into their leases providing transparency to, and securing the informed consent of, every resident prior to the initiation of master-metered service. Edwards inserted that language in its leases in anticipation of AEP Ohio performing its obligations under its tariff and has informed NEP that each and every lease agreement appoints Edwards to receive electric service from AEP Ohio and to supply that electricity to tenants. A sample of the terms required to be included in every Fisher Commons tenant's lease under NEP's contract with Edwards is attached hereto as Exhibit NEP-1.[3] All private parties have consented to the arrangement whereby Edwards has requested and will receive master-metered service from AEP Ohio and provide that service to tenants with NEP's assistance. Only one party – AEP Ohio – objects to this arrangement despite having no interest in Edwards' private property and a clear obligation under its tariff to provide the requested service. And, AEP Ohio's objection and refusal to comply with its tariff has arisen *years* after it had originally complied with the tariff and began to perform the necessary work, and after Edwards, NEP and OSU have dedicated considerable time and resources in reliance on AEP Ohio's representations.

Simultaneously with the events described above, AEP Ohio and NEP have been engaged in a complaint case brought by AEP Ohio against NEP (herein called the "Complaint Case") in which AEP Ohio alleged, as it does in the Application, that NEP's business model renders it an "unlawful public utility." Relevant to this proceeding, in its Entry dated December 28, 2021, the

[3] Upon approval of AEP Ohio's final form resale tariff as ordered by the Commission in the Complaint Case, NEP and Edwards will ensure that all leases contain language complying with the requirements of that tariff.

Commission granted NEP's Motion for Stay and ordered AEP Ohio to complete five (5) conversions to master metered service that are substantively identical to the Fisher Commons conversion and **did not apply the Miller Act to those conversions**. The Fisher Commons project was known to AEP Ohio at least two months prior to the filing of its complaint, and yet AEP Ohio made no mention of Fisher Commons in the Complaint Case and continued to proceed with construction throughout that case.

As to AEP Ohio's claims, that case was decided in NEP's favor by the Commission on September 6, 2023, and the Commission denied AEP Ohio's application for rehearing on December 13, 2023.[4] In its Opinion and Order the Commission made the following relevant findings:

- "NEP cannot be an electric light company because the landlord of each of the Apartment Complexes **and not the tenant** is the 'consumer,' as contemplated under R.C. 4905.03(C), of electricity supplied by AEP Ohio." *Ohio Power Company* at ¶ 184 (emphasis added).
- "[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**." *Id.* at ¶ 194 (emphasis added).
- "We make the following findings, which establish that NEP is not 'engaged in the business of supplying electricity': (1) **the landlords and not NEP supply electricity** to tenants under the terms of the leases on their own property, as already **permitted by**

[4] *Ohio Power Company, supra,* Second Entry on Rehearing (December 13, 2023) at ¶ 1

law; (2) foundational to all aspects of NEP's activities at the Apartment Complexes, the landlords have entered into express agency relationships with NEP through contracts that **authorize NEP to "step into the shoes of the landlords"** in facilitating submetering service at the properties; (3) as the landlords' agent, NEP is "engaged in the business of" **providing a service to landlords** that helps facilitate submetering service at the Apartment Complexes to the tenants and not to the general public." *Id.* at ¶ 207 (emphasis added).

- "NEP, itself, is essentially a service provider a landlord hires to provide services such as energy control, advisory services, energy construction and design solutions, electric vehicle charging, equipment financing, utility rates and tariff monitoring and support, tenant billing, and other energy-related services (NEP Ex. 90 at 4-10)." *Id.* at ¶ 221.
- "As discussed above, we found that NEP is not an electric light company under R.C. 4905.03(C). Therefore, NEP cannot be an electric supplier under R.C. 4933.81(A), meaning its operations at the Apartment Complexes cannot violate the CTA under R.C. 4905.03(C)." *Id.* at ¶ 221.
- "[G]iven the Commission's findings in this case, **continued denial of conversion requests simply because the property owner chooses to utilize the third-party submetering services of NEP, as described in this Order, will run contrary to our decision today**." *Id.* at ¶ 265 (emphasis added).
- "Accordingly, we direct AEP Ohio to file within 90 days a new electric reseller tariff that places the following conditions on the resale of electric service from a landlord to a tenant that a landlord must follow in order to comply with the tariff:

1. Notice must be provided within the landlord's lease agreement stating that, by signing the lease, the tenant agrees to have the landlord secure and resell electricity to the tenant and that, under current law, the tenant is no longer under the jurisdiction of the Commission and loses the rights under law associated with being under the Commission's jurisdiction. This language should be printed in the lease in all capital letters and in a minimum font larger than the remainder of the lease language.

2. The landlord's charges for resale of electricity to each tenant must be the same or lower than the total bill for a similarly situated customer served by the applicable utility's standard service offer.

3. When engaging in the disconnection of electric service to a tenant for nonpayment of charges related to electric usage, the landlord must follow the same disconnect standards applicable to landlords under Ohio Adm.Code Chapter 4901:1-18. *Id.* at ¶ 224.

AEP Ohio's Application, filed prior to the Commission's decision in the Complaint Case, assumes that many of the issues in that case would be resolved in its favor. For example, AEP Ohio submits that NEP "engages in the resale or redistribution of public utility services" and that "Ohio law is unsettled in the wake of the Supreme Court of Ohio's December 2020 *Wingo* [sic]." Application at ¶¶ 6, 11. As the Commission's thorough, well-reasoned Opinion and Order made clear, NEP does not engage in the resale or redistribution of public utility services. And, to whatever extent Ohio law may have been "unsettled," the Commission's Opinion and Order definitively settled that NEP is not a "public utility." Thus, the Commission's decision in the

Complaint Case undermines the entire foundation of AEP Ohio's argument as to the applicability of the Miller Act.

III. ARGUMENT

As further explained below, this Application has been improperly filed because (1) changes in *how* service is provided on private property do not cause an "abandonment" that triggers the Miller Act; (2) Landlords have an unequivocal right to receive master-metered service under long-standing Ohio Supreme Court precedent and AEP Ohio's own Commission-approved tariff; (3) the Commission's recent decision in the Complaint Case confirms that the Commission cannot interfere in the landlord-tenant relationship, and (4) AEP Ohio has forfeited any protections the Miller Act may have offered by agreeing to perform the requested work and inducing NEP and Edwards to rely on its representations. Therefore, the only outcome in these proceedings consistent with the law is a dismissal of the Application.

A. <u>First basis for dismissal</u>: Changes in *how* service is provided on private property do not cause an "abandonment" that triggers the Miller Act

i. No service will be "abandoned."

First, however one wants to approach AEP Ohio's novel theory, the necessary conclusion is that "the Commission's ruling under the Miller Act" is not necessary or appropriate here. First and most obvious, no service will be "abandoned" at all. AEP Ohio will continue to supply electricity to Fisher Commons and both Edwards and its tenants will continue to use that electricity. The metering arrangement and tariffed service schedule will change, but the same amount of electricity will flow from AEP Ohio to Fisher Commons and its tenants. **AEP Ohio will continue to serve the exact same load.** Thus, the Miller Act's express purpose is not invoked here – no service will be *terminated*, only which AEP Ohio tariff section applies will change. "The Miller

Act was enacted to protect consumers from having their service terminated because of the whims of a public utility or rogue municipality," and where that purpose is not invoked, the Court will "decline the opportunity to permit the protections of the Miller Act to be distorted into a weapon" by a utility. *Grafton, infra,* at 109. The indisputable fact that AEP Ohio will continue to supply electricity to Fisher Commons, and no service will be terminated, is fatal to the Application.

An alternative view is that service to tenants will be transferred from AEP Ohio to Edwards which, again, has a perfectly clear legal right to resell and redistribute service to tenants and is unregulated by the Commission. From that perspective, "[t]he Commission has previously found that transactions involving the transfer of service by a regulated public utility to service by a nonregulated entity are not tantamount to an abandonment of service or facilities within the meaning of R.C. 4905.20 and 4905.21." *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Abandon Natural Gas Service*, Case No. 18-1662-GA-ABN, Finding and Order (March 10, 2021) at ¶ 3, citing *In re Southeastern Natural Gas Co.*, Case No. 15-1508-GA-ATR, Finding and Order (June 1, 2016); *In re Northern Industrial Energy Development, Inc.*, Case No. 05-1267-GAATR, Finding and Order (Dec. 14, 2005); *See also: In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a Transfer of Facilities and Customers, and a Transportation Agreement with Utility Pipeline Ltd.,* Case No. 04-1417-GA-ATR, Finding and Order (February 2, 2005) at ¶ 9 ("the application reflects that a regulated utility's service is to be transformed into a nonregulated service and the Commission has previously found such transactions are not tantamount to an abandonment of service or facilities and are not subject to Commission review under Sections 4905.20 and 4905.21, Revised Code."). **The Commission has settled this question already** – a transfer of tenants' service from AEP Ohio to their landlord does not raise a Miller Act issue and the Application must be dismissed.

ii. The plain wording of the Miller Act excludes lines and service on private property from the scope of the Act.

Second, even if the Commission accepts that Fisher Commons' change from residential to commercial service will result in an "abandonment" of service to Fisher Commons' tenants despite their continuing to receive electric service from AEP Ohio through their landlord (it should not), that conclusion still would not invoke the Miller Act. Any change in service necessarily involves ceasing to provide the old service in favor of the new service, but **not all service is subject to the Miller Act**:

R.C. 4905.20 provides:

> [N]o public utility as defined in section 4905.02 of the Revised Code furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any . . . electric light line . . . or any portion thereof . . . or the service rendered thereby, that has once been . . . **used for public business**, nor shall any such facility be closed for traffic or service thereon, therein, or thereover except as provided in section 4905.21 of the Revised Code. (emphasis added)

And R.C. 4905.21 provides:

> [A]ny public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn, or closed for traffic or service all or any part of any line . . . referred to in section 4905.20 of the Revised Code, shall make application to the public utilities commission in writing. The commission shall thereupon cause reasonable notice of the application to be given, stating the time and place fixed by the commission for the hearing of the application.

AEP Ohio's position runs against the plain wording of the statute. The words "used for public business" must have meaning and cannot be read out of the statute. The legislature's inclusion of those words ensures that matters affecting "public business" are subjected to due process at the Commission. As a corollary, matters affecting only one private property remain at the discretion of the owner of that property – equipment or service entirely within the bounds of private property are not "used for public business." The legislature carefully drafted the Miller Act to maintain the line of demarcation between the Commission's jurisdiction and the rights of private property owners at the property line. The Miller Act ensures that a utility cannot

unreasonably leave a customer without service because the lines running between properties are "used for public business," but it does not permit the Commission or public utilities to usurp the prerogatives of customers and property owners in Ohio in determining *how* that service is provided. The Miller Act is simply irrelevant to any property owner's request for a utility to change its tariffed service or metering configuration on their own property.

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 other words, courts may not delete words or insert words not used." *In re Collier, supra.* By holding that the words "used for public business" exclude private property from the scope of the Act, the Commission will give effect to the words of the statute in a manner consistent with its prior decisions. As the Commission found in *Brooks*, a utility "has no obligation to directly serve the tenants [on the landlord's property] absent the landlord's request for such direct service. In addition, since the [utility's] obligation to serve…ends **at the landlord's property line**, [the utility's] power to prohibit or restrict electrical service between the landlord and tenants through the [utility's] tariff must also end **at the landlord's property line**." *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 (emphasis added). The Commission confirmed in the Complaint Case that "**the 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 (i) the Miller Act, (ii) AEP Ohio's obligation to serve, and (iii) 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 and

AEP Ohio's obligation to serve ends: at the property line. The Commission must give effect to those words, and in doing so should dismiss the Application.

In other words, there is no "abandonment" that would require an application to the Commission because the utility's ultimate customer – the landlord – continues to receive service from the utility regardless of the configuration of the metering on their property. As the Commission recently reaffirmed, "the landlord…**and not the tenant** is the 'consumer,' as contemplated under R.C. 4905.03(C), of electricity supplied by AEP Ohio." *Ohio Power Company* at ¶ 184 (emphasis added). Where the **utility continues to serve every consumer**, every line "used for public business" remains in service and no abandonment that would trigger an application of the Miller Act has taken place. **AEP Ohio will continue to supply electricity to the Fisher Commons property, and tenants will continue to use that electricity; no service will be "abandoned."**

In *State ex rel. Toledo,* the Ohio Supreme Court found that the Miller Act required the City of Clyde to apply to the Commission before it could force Toledo Edison to abandon service to existing customers in the process of establishing its own municipal utility. That Court held that "the Miller Act requires commission review regarding the abandonment or closure of all electric lines, regardless of size." *Id*. at 512. But the lines at issue in *State ex rel. Toledo* were part of Toledo Edison's distribution system and Clyde required Toledo Edison to withdraw its lines from the entire city. Those lines obviously crossed property lines into each private property, i.e. they were "used for public business." That case is obviously distinguishable from Fisher Commons, where AEP Ohio will continue to serve Fisher Commons and no lines that cross into Fisher Commons' private property will be affected. That Court did not address the "used for public business" language in the Miller Act because whether those lines were "used for public business"

was not disputed or disputable. While AEP Ohio will likely rely on *State ex rel. Toledo*, the facts in that case and the issues *not* addressed render its holding of little import here.

iii. Historical application of the Miller Act confirms that changes in *how* service is provided on private property are outside the scope of the Act.

Third, AEP Ohio's interpretation of the Miller Act runs against a century of the application of that Act. AEP Ohio's tortured application of the Miller Act would explode the category of utility conduct subject to the Act and create an unprecedented burden on landlords, developers, construction companies, and businesses seeking to change how utilities are provided to their projects and properties, as well as on the Commission. If a conversion to master-metering constitutes "abandon[ing]" a facility or service subject to the Act, nothing stops the Commission from having to determine whether simply moving a metered point of delivery, changing service voltages, or even upgrading meters, is "reasonable." A customer participating in a utility time of use rate schedule who requests removal of their smart meter and a return to standard rate service could require an abandonment application – the utility would "abandon" one service and provide another instead.

And, AEP Ohio's interpretation would require application to the Commission in the reverse scenario where a multifamily complex sought to convert from master-metered commercial service to individually-metered residential service. But, despite having performed multiple such conversions in recent years and running an entire program dedicated to promoting such conversions,[5] AEP Ohio has **never** made an application for authority to abandon service to a landlord in favor of directly serving their tenants. This fact again reveals the duplicity of AEP

[5] The Complaint Case record reveals that AEP Ohio established a "SWAT" team whose roles include attempting to convince master-metered multifamily communities to convert their service to individually-metered residential service.

Ohio's position – that service changes it wants to perform do not require the Commission's input, but service changes it does not want to perform both require litigation and should be prohibited by the Commission. In reality, the law and AEP Ohio's Commission-approved tariff govern what service AEP Ohio must provide. The Miller Act cannot be used by AEP Ohio to interfere with the rights of a landlord, nor can it be used to enlist the Commission to selectively apply the law and AEP Ohio's tariff according to AEP Ohio's preferences.

Indeed, it is telling that the Miller Act has existed for over a century and not one case supports the proposition that it applies to changes in *how* service is provided on private property. Such changes occur nearly every time a building is redeveloped to be used differently or demolished to make way for new construction. In almost every instance the electric utility would cease to provide one service (including by removing certain service lines) and provide another instead, which is exactly what AEP Ohio believes would trigger the Miller Act. And yet, the Commission has never been forced to weigh in on whether those changes are reasonable – they are governed by the operation of the utility's tariff – and there is no reason to do otherwise here. "It has been said that the best construction of a statute is that which it has received from contemporary authority. * * * if there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, are the strongest evidence that it has been rightly explained in practice." *New York C. R. Co. v. Public Utilities Com.*, 171 Ohio St. 365 (1960), quoting 50 Am. Jur., 309, Section 319. That changes in *how* service is provided on private property are outside the scope of the Miller Act has been "rightly explained in practice" for over a century. AEP Ohio's attempt to give an unprecedented new meaning and purpose to the Act should be rejected on that basis alone.

In fact, if AEP Ohio's interpretation is correct (it is not), AEP Ohio (and other public utilities) would have been in violation of the Miller Act for decades. In the entire existence of the Miller Act, the Application and two others also recently filed by AEP Ohio relating to other NEP customers are the only three instances in which AEP Ohio has asserted abandonment relating to a change in service. Indeed, as described above, AEP Ohio has recently performed a number of conversions from master-metered service to individually-metered service and never once filed an application "to seek the Commission's ruling under the Miller Act" for its "abandonment" of service to those landlords or condominium associations. And, AEP Ohio has not filed an abandonment proceeding against the Oak Creek or Worthington Square properties discussed in the Complaint Case. AEP Ohio not only permitted those properties to convert to master-metered service without filing an abandonment application, it also sold them its on-site infrastructure to facilitate that conversion. Of course, AEP Ohio did so only upon their owner's execution of a contract whereby the owner agreed, among other things, not to use NEP to provide behind-the-meter services.[6] AEP Ohio's varying and opportunistic positions relating to the applicability of the Miller Act further illustrate that this proceeding is not about the Act at all, but rather about throwing as many wrenches into NEP's business as possible and AEP Ohio's lack of respect for customers like Edwards.

iv. The express legislative purpose of the Miller Act prevents its use as a weapon by utilities against customers.

Fourth, AEP Ohio's position runs contrary to the express purpose of the Miller Act. The Court in *State ex rel. Toledo* explained that "When a statute is susceptible of more than one interpretation, courts seek to interpret the statutory provision in a manner that most readily furthers

[6] A full copy of that Agreement is attached as Exhibit "D" to the testimony of Teresa Ringenbach in the Complaint Case docket.

the legislative purpose as reflected in the wording used in the legislation. *Id.* at 513, citing *United Tel. Co. v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131; *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26, 550 N.E.2d 461, 462. It went on to describe the legislative history of the Miller Act and its origins in ensuring that customers could not be left without service. To the extent that the Act is susceptible of multiple interpretations, AEP Ohio's suggested interpretation that would weaponize the Act as a tool for utilities to bully and discriminate between customers finds no support in the legislative history or intent of the Miller Act.

The Ohio Supreme Court followed *State ex rel. Toledo* with *Grafton v. Ohio Edison Co.*, (77 Ohio St. 3d 102, 109, 1996-Ohio-336, 671 N.E.2d 241 (1996)), wherein the Court limited its decision in *State ex rel. Toledo* and provided important guidance on the applicability of the Miller Act. In *Grafton*, the Court found that the Miller Act was not invoked by a municipality forcing a utility to remove service lines to customers whose service was initiated after the expiration of the utility's franchise. That is, **not all service lines are subject to the Act**. The Court's analysis shows that applicability of the Miller Act is guided by its express legislative purpose:

> "The Miller Act applies to the forced abandonment of any electric line or the service over that line. *State ex rel. Toledo Edison, supra,* 76 Ohio St.3d at 515, 668 N.E.2d at 505-506; R.C. 4905.20 and 4905.21. Yet a public utility should not be permitted knowingly to overreach the express terms of its franchise agreements to expand its service territory. Nor should a public utility be allowed to knowingly violate a municipality's right to exclusive control of utility services within the municipality, and then assert the protections of the Miller Act to prevent forced abandonment of the improperly erected service line or termination of the wrongfully instituted service.
>
> "The Miller Act was enacted to protect consumers from having their service terminated because of the whims of a public utility or rogue municipality. The Act was not created to protect overreaching public utilities from abandonment proceedings by aggrieved municipalities. Under circumstances like the ones presently before us, we decline the opportunity to permit the protections of the Miller Act to be distorted into a weapon against municipalities." *Id.* at 109.

While no case has yet addressed whether a change in *how* service is provided to a particular property requires the Commission's determination under the Miller Act, the guiding principles expressed by the Court in *Grafton* are directly applicable here. Like Ohio Edison in that case, AEP Ohio has filed its Application to distort the protections of the Miller Act into a weapon against landlords who seek to exercise their legal right to receive master-metered service. While the Act's express purpose is to protect consumers from unilateral action by utilities, AEP Ohio proposes to use the Act to legitimize its unilateral action against those very consumers. The Commission should not permit the Miller Act to be turned on its head to further the same unilateral action by public utilities that the Act was designed to restrain.

Under the Miller Act, the mere "whims of a public utility" cannot justify the termination of service. *Grafton, supra*. That is, the Miller Act is a shield for consumers against unilateral action by utilities. It is not, however, a sword for utilities to unilaterally cut apart customers' private arrangements on their own property. AEP Ohio claims that the "whims of NEP's desire to expand its 'big business' submetering footprint demands the termination of service and abandonment of distribution lines to the Fisher Commons customers." Application at ¶ 11. AEP Ohio has used this desperate attempt to cloak its unprecedented maneuver in the language of *Grafton* to deliver a lie. As explained above NEP, Edwards, and all of the Fisher Commons tenants have agreed to a master-and-sub-metering arrangement in private, mutually beneficial contracts that are beyond the Commission's jurisdiction. These mutually beneficial contracts are not "whims," and NEP could not possibly act unilaterally. Edwards is a large, highly sophisticated business, and OSU needs no superlatives. AEP Ohio's suggestion that Edwards and OSU have helplessly bent to NEP's "whims" is as absurd as it is offensive. It is AEP Ohio, not NEP, that is acting unilaterally by

interfering with these private agreements and attempting to enlist the Commission as its accomplice.

While the Miller Act may offer utilities some protection against the actions of a "rogue municipality," the Act does not protect a utility from the lawful decisions of its customers on the customers' own property. Indeed, the Miller Act was designed to protect customers first, and any protection offered to utilities by the Act is only that which is incidental to the protection of customers. The Act simply cannot offer a utility protection **against** a customer – where their interests are adverse, the Act's express legislative purpose requires that the customer's interests prevail.

Where "a regulated utility's service is to be transformed into a nonregulated service," the Commission has already settled that a Miller Act issue is not raised and this Application should be dismissed. *See Columbia Gas*, Case No. 18-1662-GA-ABN, *supra*. Even if the Commission finds some distinction between those cases and AEP Ohio's Application, AEP Ohio's attempt to turn the Miller Act on its head and use it as a weapon to further unilateral action by utilities against customers runs against the plain wording of the statute, a century of its interpretation, and its express purpose and legislative history. The Commission should dismiss this Application and clearly explain that the Miller Act does not strip property owners of their choice in *how* service is provided to their properties.

B. <u>Second basis for dismissal</u>: Landlords have an unequivocal right to receive master-metered service under long-standing Ohio Supreme Court precedent and AEP Ohio's own Commission-approved tariff.

AEP Ohio's interpretation also runs against Supreme Court of Ohio precedent and its own Commission approved tariff language. Landlords like Edwards have an unquestionable right to

receive master-metered service and to resell and redistribute that service to tenants. This right is enshrined in Ohio Supreme Court precedent and is beyond the Commission's jurisdiction to restrict. (*See Jonas, Shopping Centers, FirstEnergy, Pledger, supra*). AEP Ohio repeatedly admitted this fact in the Complaint Case and cannot present any valid legal argument otherwise here. However, if AEP Ohio's theory is correct (it is not) and the Commission could subjectively determine under the Miller Act that any given landlord's request to receive master-metered service was "unreasonable," landlords would not, in fact, have this right. The Commission could theoretically find all requests for master-metered service "unreasonable," thereby rewriting law that is well beyond the Commission's jurisdiction. The obvious solution to this conflict is that AEP Ohio has misconstrued the Miller Act, and that the Miller Act does not apply to changes in *how* service is provided on private property.

Similarly, landlords' right to receive master-metered commercial service is crystal clear and unqualified under AEP Ohio's own Commission-approved tariff. Relevant portions of AEP Ohio's tariff follow:

18. RESALE OF ENERGY

Electric service will not be supplied to any party contracting with the Company for electric service (hereinafter in this Section called "Customer") except for use exclusively by (i) the Customer at the premises specified in the service request on contract between the Company and the Customer under which service is supplied and (ii) the occupants and tenants of such premises.

A customer cannot engage in a resale of electricity if the resale would constitute the activities of an electric light company under Section 4905.03 of the Ohio revised Code. In addition, resale of energy will be permitted for electric service and related billing as they apply to the resale or redistribution of electrical service from a landlord to a tenant where the landlord is not operating as a public utility, and the landlord owns the property upon which such resale or redistribution takes place.

21. RESIDENTIAL SERVICE

The Residential Customer is a customer whose domestic needs for electrical service are limited to their primary single family residence, single occupancy apartment and/or condominium, mobile housing unit, or any other single family residential unit. Individual residences shall be served individually under a residential service schedule. The customer may not take service for two (2) or more separate residences through a single meter under any schedule, irrespective of common ownership of the several residences, except that in the case of an apartment house with a number of individual apartments the landlord shall have the choice of providing separate wiring for each apartment so that the Company may supply each apartment separately under the residential schedule, or of purchasing the entire service through a single meter under the appropriate general service schedule.

No reference is made to abandonment proceedings or case-by-case determinations of whether the landlord's choice is "reasonable." These provisions are clear and unambiguous; Edwards has a right to receive master-metered service if it so chooses, and AEP Ohio has an obligation to provide that service. Because Edwards has done everything required of it by the tariff, it is entitled to receive the requested service notwithstanding AEP Ohio's desperate Miller Act theory. Any finding to the contrary would impermissibly rewrite AEP Ohio's Commission-approved tariff.

C. Third basis for dismissal: the Commission's recent decision in Case No. 21-0990-EL-CSS confirms that the Commission cannot interfere in the landlord-tenant relationship

AEP Ohio's arguments as to the applicability of the Miller Act actually have nothing to do with NEP despite its Application's misplaced focus on NEP – they apply equally to a landlord who chooses to request master metered service on their own. As the Commission recently confirmed, "**the landlords and not NEP supply electricity** to tenants under the terms of the leases on their own property, as already **permitted by law**." *Ohio Power Company* at ¶ 207 (emphasis added). Nothing distinguishes Fisher Commons from the Commission's findings in the Complaint Case. Regardless of whether the landlord submeters at all (as opposed to including utilities in rent or charging a flat rate for utilities, both of which are common and legal), and regardless of whether the landlord contracts-out any or all of its submetering functions (many perform these in-house),

every request to reconfigure a multifamily property to master-metered commercial service involves all of the same issues that AEP Ohio believes trigger the Miller Act.

But as the Commission confirmed in the Complaint Case, "redistribution or resale of electricity by a landlord to its tenants is a matter of landlord-tenant relations and does not fall within the Commission's jurisdiction." *Id.* at ¶ 208, citing *FirstEnergy* at ¶ 9; *S.B. 3 Case* at ¶ 3. More broadly, the Commission held that that "issues related to landlord-tenant law extend beyond the Commission's jurisdiction." *Id.* at ¶ 208, citing *Brooks*, Opinion and Order (May 8, 1996) at 15; *FirstEnergy* at ¶¶ 9-10. If the law is settled that issues between landlords and tenants are beyond the Commission's jurisdiction, what criteria could the Commission possibly use to determine whether a landlord's resale of electricity to tenants is "reasonable?" *Id.* at ¶ 207. The fact that the Commission would have to insert itself into the landlord-tenant relationship, where it has repeatedly confirmed it lacks jurisdiction, to even begin the "reasonableness" inquiry again illustrates the inapplicability of the Miller Act to the Fisher Commons conversion.

As related above, Fisher Commons' tenants will not be "customers" of NEP, but will purchase electricity from their landlord, Edwards. And, the same essential arrangement (without the economic or technological benefits) could be achieved by Edwards simply maintaining all residential utility accounts in its name. That is, **whether any resident at Fisher Commons is or remains an AEP Ohio customer is already a matter entirely controlled within the landlord-tenant relationship and outside of the Commission's jurisdiction.**

With only a flawed and incomplete legal argument, the Application's thrust turns to policy and the "enumerable [sic]" harms that would befall tenants if AEP Ohio followed its tariff. Application at ¶ 13. First, these **"harms" are irrelevant to the strictly legal question of whether**

the Miller Act applies to changes in *how* service is provided on private property. Second, these "harms" are illusory. As the evidence in the Complaint Case demonstrated, NEP already (1) requires its landlord clients to include language designed to provide transparency and secure tenants' informed consent in every lease, (2) requires landlords to agree that the total bill paid by tenants will never exceed the total bill that they would have paid as individually-metered customers of the local utility, and (3) when directed to disconnect by its clients, NEP provides (on behalf of its clients) disconnection protections for tenants that are nearly identical to those provided to residential utility customers. NEP simply would not agree to work with a landlord who did not agree to the above, and all of the above apply equally to Fisher Commons.

Second, the Commission has already ordered AEP Ohio to put protections for tenants of master-metered properties into place via a revised resale tariff. To the extent that the Commission can address the "harms" AEP Ohio speculates about in its Application, it already has. Finally, every speculative "harm" that the Application cites is a matter of private contract between Edwards and the Fisher Commons tenants over which the Commission lacks jurisdiction. Only the landlord and its tenants can direct how electricity is distributed and consumed on the property. The Commission need not – and cannot – substitute its own judgment for that of tenants who have signed leases agreeing to purchase electricity from their landlord as permitted by law. Therefore, AEP Ohio's policy arguments should be ignored.

D. <u>Fourth basis for dismissal</u>: AEP Ohio has forfeited any protections the Miller Act may have offered by agreeing to perform the requested work and inducing NEP and Edwards to rely on its representations.

As discussed above, changes in tariffed service on private property are outside the scope of the Miller Act. The configuration of AEP Ohio's infrastructure both before and after conversion is irrelevant – the Miller Act simply does not apply in any case. If it did, the utility could simply

choose a configuration that invoked the Miller Act for any service request it did not want to perform. Indeed, that is what AEP Ohio has attempted to do in the Northtowne and Sugar Run cases. If a utility could selectively create Miller Act issues and force customers to litigate for service, the Commission would not be able to prevent the abuse of that process. But, *arguendo*, even in the event that the Miller Act did apply to changes in tariffed service on private property, the Application should be dismissed because AEP Ohio itself has actively participated in the creation of the circumstance from which it now seeks protection. Permitting AEP Ohio's already tortured and incoherent version of the Miller Act to delay this conversion even longer and place its eventual completion in any doubt would defy basic principles of fairness and equity.

In the Northtowne Case and Sugar Run case, NEP explained how the secondary master-metered service requested at those communities would leave that arrangement intact. Secondary master-metered service is available under AEP Ohio's tariff, allows all of AEP Ohio's *lines* and the *service rendered thereby* to continue just as they are now, and AEP Ohio provides this type of service to many apartment communities in its service territory. To the extent that secondary service may require AEP Ohio to relocate some of its facilities or lines in order to attach its master meters, AEP Ohio's tariff already governs how it is supposed to work with customers to facilitate these requests without reference to the Miller Act.[7] But in each case AEP Ohio misunderstood (at best) the arrangement of its lines on those properties, representing repeatedly that it has lines serving individual tenants. It does not, and therefore should have been arguing for the *approval* of its

[7] *See* Ohio Power Company Terms and Conditions of Service, Section 12: WORK PERFORMED ON COMPANY'S FACILITIES AT CUSTOMER'S REQUEST ("Whenever, at the request of a customer and solely to suit the convenience of the customer, work is performed on the Company's facilities or the Company's facilities are relocated, the customer shall pay to the Company, in advance, the estimated total cost of such work. This cost shall include the Company's standard overheads, tax gross-up where applicable, and be credited with the net value of any salvageable material. The actual costs for the work performed will be determined after its completion and the appropriate additional charge or refund will be made to the customer to the extent the scope has significantly changed. Customers may request an itemization of cost.")

applications to provide primary service instead, because its alternative is to provide the requested secondary commercial service, not service under the residential tariff. The same is true here if AEP Ohio would like to complete the primary service on which the parties agreed rather than provide secondary service. But, spreading its confusion, AEP Ohio argued that "the Miller Act protects AEP Ohio's interest in the 'service line itself,'" and that therefore any master-metering could be prohibited. *Sugar Run Case*, AEP Ohio Mem. Contra NEP Mtn. to Dismiss at 6. While its conclusion is obviously wrong, the important piece for purposes of this case is that AEP Ohio is raising the Miller Act as a *protection for itself*.

It is indisputable that the Miller Act could only support an order that protects AEP Ohio's *lines* and its ability to continue supplying electric service over those *lines*. Even if it could apply to matters entirely within the customer's private property (it cannot), the plain wording of the Act cannot extend its operation to protect a particular metering arrangement, the tariff schedule under which service is billed, or who pays the bill. Critically, **AEP Ohio's *lines* serve whole buildings, not individual tenants**. AEP Ohio's lines end at Edwards' meter stacks outside of each building, and Edwards' private infrastructure distributes electricity to each tenant. While the only reasonable interpretation of the Miller Act is that it does not apply to service changes on private property *at all*, there is no version of the Act that could be used to prevent a change in the metering arrangement where all *lines* remain in place and in service. AEP Ohio could never have used its novel Miller Act theory to crystallize anything other than its ability to continue providing electricity up to each building.

Had AEP Ohio raised any objections to providing primary service at the outset of the project NEP, Edwards and OSU would still have had the option to request secondary master-metered service or attempt to negotiate a sale of AEP Ohio's equipment to Edwards and OSU

instead. But **AEP Ohio did not object**. Rather, it acquiesced and represented that it would complete the primary service conversion, and cooperated with NEP and Edwards over the course of the next nearly two years, including by signing a contribution in aid of construction (CIAC) agreement whereby **AEP Ohio agreed to perform the requested work in a binding contract**. NEP and Edwards relied on those representations and invested over $196,000 in furtherance of the project with the understanding that AEP Ohio would uphold its end of the bargain. All other parties – OSU, Edwards, NEP, and each of Fisher Commons' tenants - have agreed in mutually beneficial contracts, and each had every right to reasonably expect that AEP Ohio would perform its obligations under its tariff and the CIAC agreement.

Its affirmative representations and past practices, a binding contract, and NEP's and Edwards' reliance thereon, should estop AEP Ohio from asserting the Miller Act as a *protection* against completing that service request at the 11th hour. To whatever extent the Miller Act may protect utilities from decisions made by their own customers on their own properties (it does not), AEP Ohio has forfeited those protections by agreeing to perform the requested service change, acting on its representations, and leading Edwards and NEP to believe that it would, in fact, finish the job. AEP Ohio should not be permitted to violate its tariff and contracts to pull the rug out from under its customers just because it cooked up a new legal theory mid-project.

IV. CONCLUSION

The Miller Act is not a sword for public utilities to use at their whim, but a shield to protect existing customers. *State ex rel. Toledo* at 513 ("the Miller Act focuses upon protecting existing utility customers from having their service terminated without commission approval"). Because there is no "abandonment" when a private property owner merely changes its tariffed service and **no service is terminated**, the Miller Act is not applicable to the Fisher Commons conversion. The

Commission has already settled that "the transfer of service by a regulated public utility to service by a nonregulated entity [is] not tantamount to an abandonment of service or facilities within the meaning of R.C. 4905.20 and 4905.21." *Columbia Gas,* Case No. 18-1662-GA-ABN, *supra*. Therefore, the Commission should dismiss AEP Ohio's Application. Any other result would run afoul of the plain wording of the Miller Act, a century of its interpretation, and its express legislative intent. Further, failure to dismiss the Application would ignore the well-established legal rights of landlords to receive master-metered service and AEP Ohio's own tariff, and would impermissibly insert the Commission into the landlord-tenant relationship. Finally, AEP Ohio forfeited any protections it may have been able to claim under the Miller Act by agreeing to complete the service request and inducing Edwards and NEP to rely on its representations.

The Commission should permanently foreclose AEP Ohio's attempt to open a loophole in the obligations imposed on it by its tariff and avoid having to entertain frivolous applications in the future by issuing a decision clearly setting forth that landlords may change between available tariffed service schedules like any other commercial customer.

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 February 6, 2024.

/s/ Drew B. Romig
Drew B. Romig (0088519)

Email service list:

Ohio Power Company:
stnourse@aep.com
mjschuler@aep.com

EXHIBIT NEP-1

Sample Lease terms required by contract to be inserted in tenant leases at Fisher Commons:

"Lessor shall secure and resell to Lessee, and Lessee shall promptly pay all charges incurred for, (if checked) **_X_** electricity, ___gas, **_X_** water and sewage, ___trash removal, ___cable TV, ___master TV antenna (the "Resold Commodities"). Lessee agrees that with respect to the Resold Commodities that Lessor shall place all such utilities in Lessee's name. Conversely, Lessee agrees to place all other utilities for which Lessee is responsible in Lessee's name prior to receiving occupancy of the premises. The Lessee agrees to pay all other utilities, related deposits and charges on the Lessee's utility bills. The Lessee shall not allow utilities, other than cable TV, to be disconnected by any means (including non-payment of bill) until the end of the Lease term or renewal period. The Lessee agrees to reimburse the Lessor for any utility bills paid by the Lessor during the Lessee's responsibility under the Lease within two (2) working days of receiving demand for payment from the Lessor. Utilities shall be used only for normal household or commercial purposes and not wasted. Lessee hereby waives and disclaims Lessee's right to shop for and choose providers of the Resold Commodities and any portion or component thereof. Lessee further agrees to refrain from entering into any contracts for the supply or provision of the Resold Commodities without Lessor's express written consent, and acknowledges that entering into such a contract without Lessor's express written consent shall constitute a substantial default under this lease. ***Notwithstanding anything to the contrary contained herein, Lessee agrees that the Lessor may arrange to have a meter or meters installed to measure Lessee's usage of the Resold Commodities. If metered, Lessor or its agent shall supply Lessee with information of the cost per unit of the Resold Commodities and the number of units consumed. Rates per unit of the Resold Commodities consumed shall be consistent with rates per unit billed by regulated utilities including all applicable riders, line extension fees and customer charges. Lessee further agrees to pay for such usage, based upon Lessee's actual metered or ratio-allocated usage plus the apportioned share of common area usage (if applicable) and any other fees incurred by Lessee. Billing for usage of the Resold Commodities shall be considered part of the rent, though it will be separately invoiced and collected. It is understood and agreed between Lessor and Lessee that, in the event such payments are not made when due, it shall be considered a substantial default under the lease, and Lessee agrees that Lessor may bring summary proceedings for collection and/or eviction.*** LESSOR IS NOT OPERATING AS A PUBLIC UTILITY BY ARRANGING FOR THE SERVICES SET FORTH HEREIN, AND NOTHING HEREIN SHALL CAUSE LESSOR TO BE, OR BE DEEMED TO BE, A PUBLIC UTILITY."

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