

IN THE SUPREME COURT OF OHIO

Ohio Power Company)	Case No. 2024-29
)	
Complainant,)	
)	
v.)	On Appeal from the Public Utilities
)	Commission of Ohio
)	
Nationwide Energy Partners, LLC)	
)	Pub. Util. Comm. No. 21-990-EL-CSS
Respondent.)	

FIRST MERIT BRIEF OF APPELLANT
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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. STANDARD OF REVIEW	2
III. STATEMENT OF FACTS	3
IV. ARGUMENT	8
 Proposition of Law No. 1: The Public Utilities Commission violates Ohio law and the Ohio Administrative Code when it denies intervention to a party in a matter where it has a “real and substantial interest” (Ohio Adm.Code 4901-1-11 (Appx. 39)) and could be “adversely affected” by the outcome of the matter (R.C. 4903.221 (Appx. 4)). <i>Ohio Consumers Counsel v. Public Util. Comm.</i> , 111 Ohio St.3d 384, 2006-Ohio-5853.....	
	8
 Proposition of Law No. 2: The Public Utilities Commission acts unreasonably when it deprives apartment complex consumers rights under Ohio law to adequate, safe, and reasonable electric utility service when they receive electric service from submetering companies like NEP. Apartment complex consumers who receive submetered utility service should have the same rights as residential utility consumers who receive PUCO-regulated service. being provided service from a reseller of electricity.	
	12
V. RELIEF REQUESTED.....	16
VI. CONCLUSION.....	17
PROOF OF SERVICE.....	19

TABLE OF CONTENTS - cont'd

APPENDIX	PAGE
 <u>STATUTES:</u>	
R.C. 4903.10	000001
R.C. 4903.13	000003
R.C. 4903.221	000004
R.C. 4905.02(A).....	000006
R.C. 4905.03(C).....	000008
R.C. 4905.22	000011
R.C. 4905.26	000012
R.C. 4911	000013
R.C. 4933.83(A).....	000037
 <u>RULES:</u>	
Ohio Adm.Code 4901-1-11	000039
Ohio Adm.Code 4901-1-11(A)(2)	000039
Ohio Adm.Code 4901-1-11(B)(1)-(4)	000039
Ohio Adm.Code 4901-1-15(A).....	000041
 <u>APPLICATIONS FOR REHEARING:</u>	
<i>In re In the Matter of the Complaint of Ohio Power Company v. Nationwide Energy Partners, LLC,</i> Pub. Util. Comm. No. 21-990-EL-CSS	
Application for Rehearing by Office of the Ohio Consumers' Counsel (August 26, 2022)	000043
Motion for Leave to File Instantaner an Application for Rehearing by Office of the Ohio Consumers' Counsel (October 6, 2023)	000062
Application for Rehearing by Office of the Ohio Consumers' Counsel (October 6, 2023)	000070
 <u>ENTRIES AND ORDERS OF THE PUBLIC UTILITIES COMMISSION OF OHIO:</u>	
<i>In re In the Matter of the Complaint of Ohio Power Company v. Nationwide Energy Partners, LLC,</i> Pub. Util. Comm. No. 21-990-EL-CSS	

Opinion and Order, 2023 Ohio PUC LEXIS 897 (September 6, 2023)000088

Second Entry on Rehearing, 2023 Ohio PUC LEXIS 1209 (December 13, 2023)
.....000255

*In the Matter of the Commission’s Consideration of Solutions Concerning the
Disconnection of Gas and Electric Service in Winter Emergencies for the 2022-2023
Winter Heating Season,*
Pub. Util. Comm. No. 22-668-GE-UNC

Finding and Order, 2023 Ohio PUC LEXIS 685 (July 12, 2023).....000278

*In the Matter of the Commission’s Consideration of Solutions Concerning the
Disconnection of Gas and Electric Service in Winter Emergencies for the 2023-2024
Winter Heating Season,*
Pub. Util. Comm. No. 23-856-GE-UNC

Finding and Order, 2023 Ohio PUC LEXIS 1006 (October 4, 2023)000292

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>Industrial Energy Users-Ohio v. Pub. Util. Comm.</i> , 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195	3
<i>Ohio Consumers Counsel v. Public Util. Comm.</i> , 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940	2, 8, 9, 10
<i>Ohio Edison Co. v. Pub. Util. Comm.</i> , 78 Ohio St.3d 466, 678 N.E.2d 922 (1997)	3
<i>Wingo v. Nationwide Energy Partners, L.L.C.</i> , 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617	4
 <u>ENTRIES AND ORDERS OF THE PUBLIC UTILITIES COMMISSION OF OHIO:</u>	
<i>In re In the Matter of the Complaint of Ohio Power Company v. Nationwide Energy Partners, LLC</i> , Pub. Util. Comm. No. 21-990-EL-CSS	
Opinion and Order, 2023 Ohio PUC LEXIS 897 (September 6, 2023)	6, 8, 11, 16
Second Entry on Rehearing, 2023 Ohio PUC LEXIS 1209 (December 13, 2023)	8
<i>In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2022-2023 Winter Heating Season</i> , Pub. Util. Comm. No. 22-668-GE-UNC	
Finding and Order, 2023 Ohio PUC LEXIS 685 (July 12, 2023).....	16
<i>In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2023-2024 Winter Heating Season</i> , Pub. Util. Comm. No. 23-856-GE-UNC	
Finding and Order, 2023 Ohio PUC LEXIS 1006 (October 4, 2023)	15
 <u>STATUTES:</u>	
R.C. 4903.10	6, 7 8
R.C. 4903.13	2
R.C. 4903.221	2, 3, 5, 8. 9
R.C. 4905.02(A).....	6

R.C. 4905.03(C).....	6, 7
R.C. 4905.22	12
R.C. 4905.26	12
R.C. 4911	2, 4
R.C. 4933.83(A).....	4

RULES:

Ohio Adm.Code 4901-1-11	2, 5, 8, 10
Ohio Adm.Code 4901-1-11(A)(2)	10
Ohio Adm.Code 4901-1-11(B)(1)-(4)	10
Ohio Adm.Code 4901-1-15(A).....	5

I. INTRODUCTION

This appeal seeks to protect the rights of residential utility consumers to “adequate, safe, and reasonable electric service.” The PUCO in rulings issued below found that residential consumers living in apartment complexes lose their right to basic utility service protections when served by an entity like Nationwide Energy Partners, a submeterer (reseller) of essential utility service. The PUCO found that such consumers will lose “a multitude of rights and protections . . . that ensure consumers receive adequate, safe, and reasonable electric service, as required by law.” (R. 138 at ¶ 224, Appx. 199).

The residential utility consumers harmed by the PUCO’s decisions live in certain apartment complexes within the service territory of Ohio Power Company (“AEP Ohio”). Third-party submetering company Nationwide Energy Partners (“NEP”) wants to submeter (resell) electric service to the apartment complex residents. The PUCO’s order determined that the PUCO has no jurisdiction over NEP or the submetered electric service it will provide. (R. 138 at ¶ 179, Appx. 174). Thus, the apartment complex consumers served by NEP will lose (or already have lost) consumer protections and legal rights that they would otherwise receive from electric distribution service provided by the PUCO-regulated utility, AEP Ohio.

The PUCO erred by issuing an order that unjustly and unreasonably denies electric service rights under Ohio law and the PUCO’s rules to the residential utility consumers living in the apartment complexes where NEP plans to resell essential electric utility service. (R. 138 at ¶ 224, Appx. 199-200). The apartment complex consumers living in the NEP submetered apartments should have the same consumer protections under Ohio law and the PUCO’s rules as residential consumers who receive electric utility service directly from the PUCO-regulated utility, AEP Ohio.

To make matters worse, the PUCO made its decision without input from the very consumers who would be harmed by its ruling. It denied OCC, the statutory legal advocate for Ohio's residential utility consumers (R.C. 4911 (Appx. 14)), the right to participate in the proceeding below.

The Office of the Ohio Consumers' Counsel ("OCC") moved to intervene in the case below to advocate for residential utility consumers who stand to lose their PUCO-regulated electric utility service. (R. 6). But the PUCO denied OCC's intervention. (R. 29, 68). Residential utility consumers had no voice, yet their rights were extinguished under the PUCO orders. The PUCO's denial of intervention to OCC violates R.C. 4903.221 (Appx. 4), Ohio Adm.Code 4901-1-11 (Appx. 39), and this Court's prior precedent that intervention in PUCO proceedings should be liberally allowed. *Ohio Consumers Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940 ¶ 20.

OCC respectfully requests that the Court vacate the PUCO's order. The Court should on remand instruct the PUCO to grant OCC's motion to intervene and reopen the record to allow OCC to present evidence and argument. The PUCO should be instructed to issue an order on remand taking into consideration the evidence and argument presented on behalf of residential consumers by the OCC. Alternatively, the Court should vacate the PUCO's order and direct a finding that NEP is a public utility, and its consumers must receive the same protections that all residential utility consumers served by PUCO-regulated utilities receive under Ohio law.

II. STANDARD OF REVIEW

R.C. 4903.13 (Appx. 3) governs this Court's review of PUCO orders. It provides in pertinent part, "[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of

the opinion that such order was unlawful or unreasonable * * *.” The Court has interpreted this standard as turning upon whether the issue presents a question of law or a question of fact.

The Court has “complete and independent power of review as to all questions of law.” *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997). The Court can also reverse a PUCO order if its factual findings are “manifestly against the weight of the evidence” and “so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *Industrial Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 489, 2008-Ohio-990, 885 N.E.2d 195, ¶ 12.

OCC’s assignments of error raise questions of law. The first Proposition of Law explains that the PUCO unlawfully denied OCC intervention in the case below that “adversely affected” (R.C. 4903.221 (Appx. 4)) the apartment complex consumers’ rights under Ohio law and the PUCO’s rules regarding their electric utility services.

The second Proposition of Law explains how the PUCO’s order wrongly denied the submetered electric consumers consumer protections under Ohio law and the PUCO’s rules. Because the PUCO denied OCC intervention, these residential utility consumers had no say in the case below about their rights to adequate, safe, and reasonable electric service under Ohio law.

It is with these standards in mind that the Court should resolve the issues that directly impact the apartment complex consumers who are forced to take submetered electric service.

III. STATEMENT OF FACTS

AEP Ohio is a PUCO-regulated electric distribution utility that serves over 1.3 million consumers throughout Ohio. NEP is a company that serves apartment and other multi-family property owners by submetering (reselling) public utility services to individual apartment

complex consumers. Under such arrangements, these consumers are billed for their share of the utility services used by the entire property. This Court has previously described NEP as a “big business,” “third-party reseller[]” that provides “submetering services for multiple properties and landlords” for profit.¹

OCC is the statutory legal advocate for Ohio’s residential utility consumers, under R.C. 4911. (Appx. 14).

The PUCO proceeding below began on September 24, 2021, when AEP Ohio filed a complaint against NEP. (R. 1). AEP Ohio’s complaint aimed to resolve “whether AEP Ohio must turn over to NEP the electric distribution service” that it was providing to residential consumers living at five apartment complexes (the “apartment complex consumers”) in AEP Ohio’s service territory. (R. 1 at ¶ 8). At the time of the complaint, AEP Ohio alleged that it provided “electric distribution service directly to 1,069 individual [consumers]” living in the apartment complexes. (R. 1 at ¶ 8, R. 90 at 29).

AEP Ohio alleged that NEP demanded that AEP Ohio terminate utility service to the apartment complex consumers so NEP could establish master metered service to submeter (resell) electric service to them. (R. 1 at ¶ 9). AEP Ohio further alleged that if NEP were allowed to take over service from AEP Ohio, NEP would be operating as a “public utility” in violation of the Certified Territory Act (R.C. 4933.83(A) (Appx. 37)) and numerous other statutes and regulations. (R. 1 at ¶ 11). AEP Ohio alleged that if the apartment complex consumers lose their PUCO-regulated electric utility service provided by AEP Ohio, they will lose numerous rights under Ohio law and the PUCO’s rules. (R. 1 at ¶¶ 53-66, R. 90 at 60-61)).

¹ See *Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617 ¶ 3.

To advocate for AEP Ohio’s residential utility consumers and the apartment complex consumers, OCC filed a motion to intervene and memorandum in support on October 28, 2021. (R. 6). OCC fully explained in the motion to intervene its interest in the case and how it satisfies the standards set forth in R.C. 4903.221 (Appx. 4) and Ohio Adm.Code 4901-1-11 (Appx. 39).

On November 12, 2021, NEP filed with the PUCO a memorandum contra opposing OCC’s intervention and participation in the case on behalf of the apartment complex consumers. (R. 8). According to NEP, OCC had no interest in the case because it is “a complaint proceeding involving commercial properties (apartment complexes) owned by AEP Ohio’s commercial customers.” (R. 8 at 1). NEP also claimed that OCC’s intervention would unduly prolong and delay the proceeding and that OCC’s interests were “already adequately protected by AEP Ohio’s participation.” (R. 8 at 8).

On January 31, 2022, the Attorney Examiner in the case below denied OCC’s intervention. (R. 29 at ¶ 37). The Attorney Examiner determined that OCC’s only interest was in the case’s “precedential value.” (R. 29 at ¶ 37). The Attorney Examiner further ruled that OCC could not establish that it had a “real and substantial interest” in the proceeding. (R. 29 at ¶ 37).

On February 7, 2022, OCC filed an Interlocutory Appeal (as of right)² to the PUCO of the Attorney Examiner’s decision. (R. 31). OCC’s Memorandum in Support of its Interlocutory Appeal restated and emphasized that its pleadings (Motion to Intervene (R. 6) and Reply to NEP’s Memorandum Contra (R. 10)) established that OCC satisfied the intervention standards of R.C. 4903.221 (Appx. 4) and Ohio Adm.Code 4901-1-11 (Appx. 39). (R. 31 at 2, 4-6).

On July 27, 2022, the PUCO denied OCC’s Interlocutory Appeal. (R. 68 at ¶ 53). The PUCO ruled that OCC did not have a “real and direct” interest in AEP Ohio’s complaint

² Ohio Adm.Code 4901-1-15(A) (Appx. 41).

proceeding. (R. 68 at ¶ 54). The PUCO affirmed the Attorney Examiner’s ruling that OCC’s only interest in AEP Ohio’s complaint proceeding was in its “precedential value.” (R. 68 at ¶ 53). The PUCO also stated that OCC’s intervention was “premature” because any interest OCC had would be moot if the PUCO determined that NEP did not operate as a public utility. (R. 68 at ¶ 54).

On August 26, 2022, OCC filed an Application for Rehearing of the PUCO’s July 27, 2022 Entry denying OCC’s Interlocutory Appeal. (R. 70). The PUCO never ruled on OCC’s Application for Rehearing. Accordingly, it was denied by operation of law under R.C. 4903.10 (Appx. 1).

To avoid a premature, piecemeal appeal that would disrupt AEP Ohio’s complaint, and consistent with the PUCO’s ruling that OCC’s motion to intervene was “premature” (R. 68 at ¶ 54), OCC did not file an immediate appeal to the Court. Instead, OCC awaited a substantive order from the PUCO that resolved the issues in the complaint and cleared the way for a single, consolidated appeal of the PUCO’s final order.

In the meantime, AEP Ohio and NEP engaged in discovery and an evidentiary hearing ultimately began on October 24, 2022. Because OCC was denied intervention, it was unable to participate on behalf of the apartment complex consumers in prehearing discovery, the evidentiary hearing, and post-hearing briefing.

On September 6, 2023, the PUCO issued its substantive order. It held that NEP does not operate as an “electric light company” under R.C. 4905.03(C) (Appx. 8) or “public utility” within the definition of R.C. 4905.02(A) (Appx. 6-7) when it submeters utility service to consumers. (R. 138 at ¶¶ 1, 179, 322, Appx. 92, 174, 247, respectively). In the order, the PUCO reiterated its previous denial of OCC’s motion to intervene. (R. 138 at ¶ 6, Appx. 94-95).

As to R.C. 4905.03(C) (Appx. 8), the PUCO determined that the “consumer” of the electricity supplied by AEP Ohio is the landlord/property owner of the apartment complexes and not the individual apartment complex consumers. (R. 138 at ¶ 184, Appx. 117). Thus, the PUCO determined that it does not have jurisdiction to regulate NEP’s submetering from the landlord/property owner to the apartment complex consumers. (R. 138 at ¶ 179, Appx. 174).

The PUCO also acknowledged that because of its decision, the apartment complex consumers at issue in the complaint would lose “a multitude of rights and protections . . . that ensure consumers receive adequate, safe, and reasonable electric service, as required by law.” (R. 138 at ¶ 224, Appx. 199). In the attempt to mitigate some of the harm to residential utility consumers that will result from NEP’s submetering, the PUCO directed AEP Ohio to file a new electric reseller tariff that imposes certain requirements on the resale of electricity. (R. 138 at ¶ 224, Appx. 200). Among these tariff requirements is a notice provision that informs tenants through their leases that “the tenant is no longer under the jurisdiction of the [PUCO] and loses rights under law associated with being under the [PUCO’s] jurisdiction.” (R. 138 at ¶ 224, Appx. 200).

As a non-party to the complaint proceeding, OCC filed on October 6, 2023, a motion for leave to file instant an application for rehearing of the PUCO’s order. (R. 140, 141, Appx. 62). The PUCO did not rule on OCC’s motion for leave to file or its application for rehearing. Because the PUCO did not grant or deny OCC’s application for rehearing, it was denied by operation of law on November 6, 2023 under R.C. 4903.10 (Appx. 2).

AEP Ohio also filed an application for rehearing of the PUCO’s order. (R. 139). On November 1, 2023, the PUCO issued an Entry on Rehearing addressing only AEP Ohio’s application for rehearing and granting it “for the limited purpose of further consideration of the

matters specified on rehearing.” (R. 146). On December 13, 2023, the PUCO issued a Second Entry on Rehearing, substantively denying AEP Ohio’s application for rehearing. (R. 150, Appx. 276). In that Entry, the PUCO stated that it considered OCC’s motion for leave “moot” as any concurrently filed application for rehearing would have been denied by operation of law under R.C. 4903.10. (R. 150 at footnote 1, Appx. 259).

On January 5, 2024, OCC filed its Notice of Appeal with this Court appealing the PUCO’s September 6, 2023, Opinion and Order and its December 13, 2023, Second Entry on Rehearing. On Feb. 9, 2024, AEP Ohio filed a Notice of Appeal with the Court appealing the same orders.

IV. ARGUMENT

Proposition of Law No. 1: The Public Utilities Commission violates Ohio law and the Ohio Administrative Code when it denies intervention to a party in a matter where it has a “real and substantial interest” (Ohio Adm.Code 4901-1-11 (Appx. 39)) and could be “adversely affected” by the outcome of the matter (R.C. 4903.221 (Appx. 4)). *Ohio Consumers Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853.

The complaint case below sought to resolve “whether AEP Ohio must turn over to NEP the electric distribution service that AEP Ohio” was providing to residential consumers living at certain apartment complexes in AEP Ohio’s service territory. (R. 1 at ¶ 8). NEP characterized the dispute as “a complaint proceeding involving commercial properties (apartment complexes) owned by AEP Ohio’s commercial customers.” (R. 8 at 1). However, the rights of residential utility consumers living in the apartments were in jeopardy. OCC, the state legal advocate for Ohio’s residential utility consumers, moved to intervene (R. 6) to advocate for the apartment complex residents who will lose their AEP Ohio electric distribution service. OCC was denied intervention to participate in the case. (R. 138 at ¶ 6).

The PUCO should have allowed OCC to intervene to represent the residential consumers forced to take NEP submetered service. The PUCO's failure to do so violated Ohio law, the PUCO's rules, and Ohio Supreme Court precedent. This Court has ruled that "intervention ought to be *liberally allowed* so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."³ OCC's motion to intervene should have been granted by the PUCO. The PUCO's failure to grant OCC's motion to intervene was an abuse of discretion.⁴

R.C. 4903.221 provides, in relevant part, that any person "who may be adversely affected" by a PUCO proceeding is entitled to seek intervention in that proceeding. (Appx. 4). There is no question that the apartment complex residents have been "adversely affected" by the PUCO's order denying them rights under Ohio law. The PUCO itself finds that residential consumers forced to take NEP service "will lose a multitude of rights and protections . . . that ensure consumers receive adequate, safe, and reasonable electric service, as required by law." (R. 138 at ¶ 224, Appx. 199-200).

R.C. 4903.221(B) (Appx. 4) requires the PUCO to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; and
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

³ *Ohio Consumers Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 20 (emphasis added).

⁴ *Id.* at ¶ 17.

To intervene, a party should also have a “real and substantial interest” according to Ohio Adm.Code 4901-1-11(A)(2) (Appx. 39) and meet the criteria of Ohio Adm.Code 4901-1-11(B)(1)-(4) (Appx. 39), which mirrors the statutory criteria in R.C. 4903.221(B) (Appx. 4).

OCC’s motion to intervene addressed all of these criteria. (R. 6). And OCC’s “real and substantial interest” in the case is demonstrated by the PUCO’s order, where the biggest losers in the case are the apartment complex consumers. Those consumers have lost “a multitude of rights and protections” regarding their electric utility service, as acknowledged by the PUCO. (R. 138 at ¶ 224, Appx. 199-200).

The PUCO’s decision to exclude participation by OCC directly contradicts this Court’s holding that “intervention ought to be *liberally allowed* so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.” *Ohio Consumers Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 20. In *Ohio Consumers’ Counsel v. PUC*, this Court held that the PUCO abused its discretion in denying intervention to OCC and reversed the PUCO.⁵ The Court relied on the reasons stated in OCC’s memoranda supporting intervention to conclude that intervention should have been granted.⁶ According to the Court:

The Consumers’ Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be adequately represented by the existing parties. In the absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should have been granted.⁷

⁵ *Id.* at ¶ 18.

⁶ *Id.* at ¶¶ 18, 20.

⁷ *Id.* at ¶ 20.

There is no evidence in the record that OCC’s intervention would “unduly prolong or delay the proceedings.”⁸ To the contrary, AEP Ohio’s complaint was filed on September 24, 2021 and OCC filed its motion to intervene just over a month later on October 28, 2021. (R. 6). Evidentiary hearings in the case commenced a year later, on October 24, 2022. The PUCO’s order was subsequently issued almost another year later, on September 6, 2023. Given OCC’s early motion to intervene, there is little merit to any claim that OCC’s intervention would have further prolonged or delayed the proceedings.

In addition, OCC explained to the PUCO in its motion to intervene how the views of residential utility consumers “would not be adequately represented by the existing parties.” (R. 6 at 2). Neither AEP Ohio nor NEP could have adequately represented the interests of the apartment complex residential consumers, who have since been harmed by the PUCO’s order. According to NEP, residential utility consumers had no interest in the first place, because NEP (erroneously) viewed the complaint as nothing more than a commercial dispute. (R. 8 at 1). Further, AEP Ohio’s interests included those of its shareholders and nonresidential customers, such as the apartment complex property owners who contract with NEP to provide submetering service.

The PUCO’s order, which harms consumers, contradicts the Court’s direction that “intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”⁹ But the apartment complex residents denied a voice in this case lose legal rights as a result of the PUCO’s order. They were harmed by the PUCO’s order.

⁸ *Id.*

⁹ *Id.* at ¶ 20.

The Court should remand the order to the PUCO with instructions to grant OCC's motion to intervene and reopen the record to allow OCC to present evidence to advocate for residential utility consumers harmed by the order.

Proposition of Law No. 2: The Public Utilities Commission acts unreasonably when it deprives apartment complex consumers rights under Ohio law to adequate, safe, and reasonable electric utility service when they receive electric service from submetering companies like NEP. Apartment complex consumers who receive submetered utility service should have the same rights as residential utility consumers who receive PUCO-regulated service. being provided service from a reseller of electricity.

The PUCO's order determined that NEP is not a public utility subject to the jurisdiction of the PUCO. (R. 138 at ¶ 224, Appx. 200). That determination means that the apartment complex consumers forced to take NEP submetered service have lost important consumer protections under Ohio law. The PUCO itself expressly acknowledged that the apartment complex consumers "will lose a multitude of rights and protections . . . that ensure consumers receive adequate, safe, and reasonable electric service, as required by law." *Id.*

The PUCO's order is unlawful and unfair. The PUCO denied consumers a voice in the case below regarding their rights under Ohio law to adequate, safe, and reasonable electric utility service under Ohio law. And the PUCO created a disadvantaged, "second class" of residential utility consumers who rent (instead of own) their living space. Ohio law (R.C. 4905.22 (Appx. 11)) requires public utilities to provide adequate services at just and reasonable rates. Similarly, R.C. 4905.26 (Appx. 12) prohibits public utilities from charging "unjustly discriminatory" rates among consumers. But the PUCO determined that NEP is not a "public utility" subject to PUCO jurisdiction. NEP now gets an unlawful free pass to charge unreasonable and unjustly discriminatory rates to the apartment complex consumers. *No residential utility consumer should*

have to sacrifice legal protections and rights simply because they live in an apartment complex that uses NEP submetering service. The PUCO's Order was unreasonable in this respect.

When residential utility consumers receive electric utility service directly from a PUCO-regulated utility like AEP Ohio, they receive many consumer protections under Ohio law and the PUCO's rules. These consumer protections include, but are not limited to:

- The PUCO's regulation of rates and service terms, including periodic audits by the PUCO;
- Being able to use the PUCO's complaint procedures and call center to seek assistance with service and billing disputes;
- Clear and informative billing information that has been reviewed by stakeholders and approved by the PUCO;
- The ability to take advantage of the PUCO's percentage of income payment plan program ("PIPP"); and
- The ability to "shop" for electric supply from marketers if they choose. (R. 138 at ¶ 223, Appx. 199).

AEP Ohio presented evidence that among the five apartment complexes at issue, at the time the complaint was filed, 510 consumers were shopping for competitive electric supply. (R. 89 at 18). Those consumers will lose their ability to choose an alternative electric supplier. Fifty-six consumers received assistance through AEP Ohio's budget billing program. (*Id.*) Three consumers participated in the PIPP Plus program for low-income consumers. (*Id.*) The PUCO's determination that it has no jurisdiction over NEP's submetering service means that residential consumers *will lose these rights* regarding their essential electric utility service. The apartment complex consumers had no say in the case below that stripped them of their rights. The Court should vacate the PUCO's Order on remand and direct the PUCO to conduct a new proceeding that allows OCC to participate on behalf of the residential consumers who are now consumers of NEP. Alternatively, the Court should vacate the PUCO's order and direct a finding that NEP is a

public utility and its consumers must receive the same protections that all residential utility consumers served by PUCO-regulated utilities receive under Ohio law.

The PUCO attempted to address the fundamental unfairness of denying legal rights to the apartment complex consumers. (R. 138 at ¶ 224, Appx. 200-201). The PUCO ordered AEP Ohio to file “reasonable terms and conditions” in its electric reseller tariff to govern landlords’ use of NEP’s submetering service. (*Id.*) But the conditions required by the PUCO are simply not enough. They do not sufficiently protect the apartment complex consumers or any other residential utility consumer with the misfortune to receive NEP submetered electric service.

First, the PUCO directs landlords to provide notice to renters in their leases. The notice will state 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 [PUCO] and *loses the rights under law* associated with being under the [PUCO’s] jurisdiction.” (R. 138 at ¶ 224, Appx. 200 (Emphasis added)). This notice does not protect consumers. Notifying a consumer that he is giving up legal rights regarding utility services is virtually meaningless for those who have to lease an NEP submetered apartment due to affordable rent or proximity to work or school.

Here, the affected apartment complex residents’ service has already been converted from AEP Ohio to NEP submetered service. (R. 89 at 19). That means these consumers who initially had AEP Ohio as their electric service provider have already been switched to NEP. It would be unreasonable to make these consumers find somewhere else to live (a non-NEP submetered property) to have full rights and protections under the law. The notice requirement does little to protect consumers.

Second, the PUCO orders that “[t]he 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.” (R. 138 at ¶ 224, Appx. 200). Limiting charges for the resale of electricity is a good thing. However, as the PUCO itself acknowledges, the apartment complex consumers who receive submetered service from NEP *will not receive the same rights under Ohio law. (Id.)* Therefore, even if the apartment complex consumers pay the same as an AEP Ohio standard service offer customer, the NEP consumer will still receive subpar service. Further, if the AEP Ohio standard service offer is higher than usual, the apartment complex consumers who want to “shop” for a more competitive electric supply offer will be unable to do so.

Third, for disconnections of service, the PUCO states that apartment complex landlords must follow the disconnection standards applicable to landlords set forth in the PUCO’s rules (R. 138 at ¶ 224). But the PUCO does not address whether consumers receiving NEP submetered service would be allowed to participate in the payment plans under the PUCO’s rules. While NEP itself may offer payment plans to consumers, there is no evidence in the case below that they will be as favorable as those provided public utility consumers under the PUCO’s rules.

Similarly, on October 4, 2023, the PUCO issued its Special Reconnect Order for protecting consumers in the upcoming heating season.¹⁰ The Special Reconnect Order protects low-income consumers from disconnections during the winter heating season when they have financial difficulties paying their utility bills. However, the Special Reconnect Order applies only

¹⁰ *In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2023-2024 Winter Heating Season*, Case No. 23-856-GE-UNC, 2023 Ohio PUC LEXIS 1006 (Oct. 4, 2023).

to consumers served by public utilities subject to the PUCO's jurisdiction.¹¹ The PUCO's September 6 order determined that NEP is not a public utility subject to the PUCO's jurisdiction. (R. 138 at ¶ 184, Appx. 177). Rather the landlord is the "consumer" served by the PUCO-regulated utility. (*Id.*) Thus, the Special Reconnect Order's protections would not apply to the apartment complex consumers served by NEP. The order does nothing to address this problem, leaving at-risk consumers vulnerable to potential electric service disconnections during the winter.

The PUCO has also issued an order that requires utilities to suspend service disconnections for thirty days following an application with a community action agency for bill payment assistance.¹² But again, that order applies only to public utilities under the PUCO's jurisdiction. Thus, consumers receiving NEP submetered service would not be eligible for this assistance. Again, the PUCO denied the apartment complex consumers a voice (through OCC) in the proceeding below regarding these issues. That is unfair and unreasonable.

The PUCO's attempt to protect NEP consumers by requiring changes to AEP Ohio's electric reseller tariff falls short. It is no substitute for all the legal rights and protections under Ohio law and the PUCO's rules that AEP Ohio consumers receive. The PUCO's order denying these rights to the apartment complex consumers was unreasonable and unlawful.

V. RELIEF REQUESTED

OCC respectfully requests that the Court OCC respectfully requests that the Court vacate the PUCO's order. The Court should on remand instruct the PUCO to grant OCC's motion to

¹¹ *Id.* at ¶ 1.

¹² *In the Matter of the Commission's Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2022-2023 Winter Heating Season*, Case No. 22-668-GE-UNC, 2023 Ohio PUC LEXIS 685 (July 12, 2023).

intervene and reopen the record to allow OCC to present evidence and argument. The PUCO should be instructed to issue an order on remand taking into consideration the evidence and argument presented on behalf of residential consumers by the OCC. Alternatively, the Court should vacate the PUCO's order and direct a finding that NEP is a public utility, and its consumers must receive the same protections that all residential utility consumers served by PUCO-regulated utilities receive under Ohio law.

VI. CONCLUSION

All residential utility consumers are entitled under Ohio law to adequate, safe, and reasonable electric utility service and they should be allowed to intervene and participate (through OCC) in cases that “adversely affect” (R.C. 4903.221 (Appx. 4)) those rights. In the case below, the PUCO unlawfully denied consumers their rights under Ohio law without giving them the opportunity to present their positions. In doing so, the PUCO created a disadvantaged second class of electric service consumers, *i.e.* those who live in apartment complex consumers served by submeterer NEP. The Court should step in to ensure that these consumers can be heard at the PUCO through their state legal advocate, OCC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing First Merit Brief by Appellant Office of the Ohio Consumers' Counsel, was served upon all parties of record via electronic transmission this April 8, 2024.

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