

In the Matter of the Commission’s) Case No. 15-1594-AU-COI
Investigation of Submetering in the State of Ohio)

The Commission has requested comments on three aspects of this investigation.

I. Are condominium associations and similarly situated entities, including third-party agents of those entities, public utilities pursuant to the Shroyer test?¹

Response: The Entry at paragraph 2, succinctly describes the three elements of the Shroyer test.

DP&L has not investigated and cannot provide the Commission with fact-based data regarding the extent to which any entity that currently provides submetering services and bills consumers would meet the three prongs of the Shroyer test. It seems likely, however, that most such entities would not. For example and with respect to the first prong of the test: while many such entities may have had to obtain a governmental

¹ *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al.. Opinion and Order (Feb. 27, 1992).

approval in the form of a zoning variance or other permit, the vast majority probably did not need to seek to obtain and exercise a right of eminent domain, obtain a franchise from a public agency, or use the public right of way. Similarly, with respect to the second prong of the test, it seems highly likely that the entity providing submetered services is not providing such services to the general public but rather to a defined group of consumers located within a defined geographic area.

2. Are there certain situations in which the Shroyer test cannot or should not be applied? If the Shroyer test cannot or should not be applied, what test should the Commission apply in those situations?

Response: The Shroyer test has been applied by the Commission and courts for nearly 25 years.

DP&L would note, however, that the Shroyer test was developed by the Commission and the Ohio Supreme Court's affirmation of the test is based in substantial part on the doctrine of deference to the expert agency in interpreting its own jurisdiction.² This suggests to DP&L that the Commission could significantly modify or rewrite the Shroyer test. Of course, such a change to long-standing precedent should not be lightly undertaken and would require findings that the existing test is inadequate to protect the public interest and that the "new" test is in the public interest based on substantial evidence and reasoned decision-making.

An alternative approach that would be less susceptible to legal challenge from those entities currently engaged in providing electric distribution services through sub-metering, would be to seek legislation that would establish a test other than the Shroyer test for Commission jurisdiction. The General Assembly could pass legislation, for

² See *Pledgor v. Public Utility Commission of Ohio*, 109 Ohio St. 3d 463, 468, 849 N.E.2d 14, 19-20 (2006). ("As this court has held in the past, "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." (citations omitted)).

example, that would make subject to the Commission's jurisdiction any person owning and operating a submetering installation by an entity with more than two or three tenants (to exclude the circumstances where an individual homeowner is renting out a room or floor of a house that is separately submetered).

Additional policy considerations that could be considered in the context of legislation include:

- o Whether a distinction should be drawn between existing and new installations (e.g., new installations could be subject to a prohibition on submetering; existing installations could be either grandfathered or made subject to a transitional rule).
- o Whether a distinction should be drawn between residential submetering installations and installations for commercial and industrial consumers (e.g., based on a finding that the need for Commission oversight is reduced where commercial and industrial consumers have roughly equivalent bargaining positions with landlords).

3. **What impacts to customers and stakeholders would there be if the Commission were to assert jurisdiction over submetering in the state of Ohio?**

Response: A. Residential Customer Benefits

There are significant consumer protections and benefits that currently are unavailable to submetered consumers. The extent to which such protections and benefits could be made available would depend on the scope of the Commission's jurisdiction and how it is exercised.

It is DP&L's understanding, for example, that submetered residential electric consumers are unable to qualify for the Percentage of Income Payment Plan Plus (PIPP Plus) and the Home Energy Assistance Programs (HEAP). While it is possible that the legislature and Commission could reformulate those programs to require that a submetering landlord make those programs available to their submetered tenants, the

more administratively simple approach may be for the legislature to prohibit, on a prospective basis, new electric submetering for residential consumers. Such legislation could also establish transitional rules that would gradually shift existing submetered residential electric consumers over to utility service, including mechanisms for the recovery of any costs utilities would need to incur to bring those existing systems up to utility safety standards.

Similarly, the Commission has long-established procedures in place that are designed to protect residential electric consumers in a variety of circumstances. Many of these are collected in Ohio Administrative Code (OAC) 4901:1-18 (Disconnection of Residential Services) or OAC 4901:-1-10 (Electric Service and Safety Standards). These protections are not generally applicable currently to submetered residential electric consumers. The protections against unreasonable rates afforded by a published tariff are also not available. All of those protections could become available to submetered residential consumers if the legislature and Commission were to make submetering landlords subject to those requirements. As noted above, however, the administratively simpler approach, however, may be to request that the legislature prohibit, on a prospective basis, new electric submetering for residential consumers, and establish transition rules to address existing submetering installations.

As a matter of State policy as enunciated at Ohio Revised Code § 4928.02, both residential and non-residential electric consumers are eligible to choose a Competitive Retail Electric Supplier (CRES) for their electric supply. But one class of electric consumers is unable to obtain that benefit – submetered tenants. It is conceivable that the legislature and the Commission could require that submetering landlords also comply

with the requirements necessary to allow submetered tenants to choose a CRES provider. In DP&L's view, however, this could provide a sound basis for a legislative transition rule: submetering landlords could be provided a certain amount of time either to establish the accounting and billing systems they need to allow for customer choice or, alternatively, to sell their meters and internal electric distribution systems to the local electric utility.

DP&L would note that Commission jurisdiction over submetering installations would not eliminate one operational problem that has often arisen. When there is an outage, a submetered consumer may be unable to identify which entity to contact, the landlord or the local electric utility, and there is often confusion as to whose equipment needs repair. This is a problem that would persist even if the Commission had jurisdiction over such submetering installations.

B. Non-Residential Consumer Benefits

Some of the same interests described above would apply as well to non-residential electric consumers that are submetered, particularly the lack of customer choice and those protections afforded by Commission regulations that are applicable across all customer classes. DP&L recognizes, however, that, in contrast to residential consumers, submetered commercial and industrial consumers may have bargaining power with a landlord that is at least roughly equivalent. The commercial tenant in a shopping mall that is submetered is likely to be more sophisticated and better able to protect itself against any potential abuses. In short, while DP&L would not oppose the legislature and Commission from bringing all submetering installations within the oversight of the Commission, DP&L believes that there is a reasonable distinction that could be drawn to limit the oversight to residential submetering installations.

C. Interests of the Electric Utility and Remaining Utility Customers.

From an electric utility perspective, submetering creates a number of challenges and problems. The regulatory model in Ohio calls for electric supply to be subject to customer choice while distribution service remains regulated. Submetering is contrary to that model as it is, at its core, a form of deregulated distribution service. While not currently a significant operational problem for utilities, there is some potential that growth in submetering installations, when combined with other technologies such as behind-the-meter generation, could adversely affect distribution service revenues to a point where costs are shifted to remaining utility customers in order to keep the utility distribution service reliable and operational.

As noted above, submetering already creates problems in the area of outage restoration because there is typically some level of confusion as to who to contact and whose equipment needs repair. In the same vein, submetering can create collection and disconnection issues for the utility in circumstances where the landlord fails to pay the utility bill, irrespective of whether or not the landlord has collected funds from tenants.

Respectfully submitted,

ss:/ *Randall V. Griffin*

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