

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's  
Investigation of Submetering in the  
State of Ohio.

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Case No. 15-1594-AU-COI

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**INITIAL COMMENTS OF  
INDUSTRIAL ENERGY USERS-OHIO**

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**JANUARY 21, 2016**

**ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

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**I. INTRODUCTION**

On December 16, 2015, the Public Utilities Commission of Ohio ("Commission") initiated an investigation regarding the proper regulatory framework that should be applied to submetering and condominium associations in Ohio. Entry at 1 (Dec. 16, 2015) ("Entry"). The Commission requested comments and reply comments on three questions:

- A. Are condominium associations and similarly situated entities, including third-party agents of those entities, public utilities pursuant to the Shroyer<sup>1</sup> test[?]
- B. 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[?]
- C. What impacts to customers and stakeholders would there be if the Commission were to assert jurisdiction over submetering in the [S]tate of Ohio[?]

Entry at 2-3. Because the scope of the Commission's response to questions raised in this investigation may impact large industrial customers in ways that the Commission

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<sup>1</sup> *In re Complaints of Inscho v. Shroyer's Mobile Homes*, Case Nos. 90-182-WS-CSS, *et al.*, (Feb. 27, 1992) ("*Shroyer*").

should consider before making any broad statements of policy, Industrial Energy Users-Ohio (“IEU-Ohio”) is submitting initial comments in response to the Entry.

As discussed below, the regulatory framework that should be applied to submetering must conform to the jurisdictional requirements of Title 49 of the Ohio Revised Code and the accepted legal standards used to determine whether an entity is a public utility. The application of the legal framework to determine if an entity, or its agent, is subject to Commission jurisdiction, moreover, must be based on a review of the facts and circumstances presented by the particular activities of the entity or its agent. The Commission may not extend its jurisdiction to entities or their agents that are not public utilities, and the Commission should not impose regulatory costs on parties to private agreements such as shared services arrangements that do not affect the public interest.

## **II. DISCUSSION**

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

Under Ohio law, there is no categorical answer to the question of whether condominium associations or similarly situated entities, including their agents, are public utilities subject to Commission jurisdiction. The determination whether an entity is or should be subject to Commission jurisdiction because it operates as a public utility must be addressed on a case by case basis.

The Commission is a creature of statute; it has only that jurisdiction and authority as provided by the General Assembly. *Columbus S. Power Co. v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.3d 535, 537 (1993). Ohio law limits the Commission's jurisdiction to "public utilities" as that term is defined in Title 49 of the Ohio Revised Code. See R.C. 4905.02 and 4905.03.

Under R.C. 4905.02, "every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in Section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit," is a public utility (but this section excludes "[e]lectric light company that operates its utility not for profit," a municipal utility, and "a public utility ... that is owned and operated exclusively by and solely for the utility's customers"). R.C. 4905.03 provides the functional or operating characteristics for various types of public utilities such as a water-works company, sewage disposal company, or an electric light company.<sup>2</sup> The functional definitions also specify that public utility status is confined to persons engaged in the business of performing the function with regard to consumers in Ohio. *In the Matter of the Application of The Procter & Gamble Company for Relief From*

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<sup>2</sup> R.C. 4905.03 provides:

As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

...

(C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

...

(G) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

...

(M) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

*Compliance With the Obligations Imposed by Title 49 of the Ohio Revised Code*, Case No. 03-725-HC-ARJ, Entry at 2 (Apr. 10, 2003).

Statutory exceptions also may prevent the Commission from exercising regulatory authority over the provision of services. As noted above, the Commission lacks jurisdiction over cooperative and municipal electric light companies. R.C. 4905.02(A). Also, R.C. 4905.03(E) provides, “The commission, upon application made to it, may relieve any producer or gatherer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as the producer or gatherer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as the producer or gatherer does not engage in the distribution of natural gas to consumers.” See, e.g., *In the Matter of the Application of American Landfill Gas Company for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Ohio Revised Code*, Case No. 97-194-GA-ARJ, Entry at 2 (Apr. 17, 1997). Under a statutory exception, the Commission concluded that a non-profit cooperative arrangement for the joint operation of a sewage treatment facility by industrial customers was not subject to the Commission’s regulatory jurisdiction. *In the Matter of the Application of Hissong-Kenworth, Inc. Requesting a Declaration Regarding its Public Utility Status*, Case No. 84-565-ST-ARJ, Entry at 1 (May 22, 1984).

“The statutory definitions, however, are not self-applying.” *Pledger v. Pub. Util. Comm’n of Ohio*, 109 Ohio St.3d 463, 465 (2006) (“*Pledger*”). For example, the

Commission applies the *Shroyer* three-part test<sup>3</sup> (that the Ohio Supreme Court (“Court”) has affirmed in *Pledger*) to determine if a landlord providing certain services to a tenant falls within the definition of a public utility subject to the Commission's regulation and supervision.

1. Does the landlord avail itself of the special benefits available to public utilities (e.g. - public franchise, public right of way, or the right of eminent domain in the construction or operation of its service)?
2. Does the landlord only provide the utility service to his tenants rather than the general public?
3. Is the provision of the utility service clearly ancillary to the landlord's primary business?

*Shroyer*, Opinion and Order at 4 (Feb. 27, 1992). See, also, *Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987, Entry (Mar. 16, 1995) (“*Brooks*”).

The Commission has extended the *Shroyer* test to commercial tenancies. In *Brooks*, commercial tenants of a mall sued the landlords, stating that the landlords were violating a resale restriction in the Toledo Edison tariffs and that the landlords were operating illegally as public utilities. The tenants also alleged that the landlords were operating as agents of Toledo Edison. *Brooks*, Entry at 2. Applying *Shroyer*, the Commission dismissed the complaint against the landlords. The Commission found that the *Shroyer* test provides adequate criteria for distinguishing entities which operate as *de facto* public utilities. *Id.*, Entry at 6. The Commission also dismissed the claim that the landlords may be acting as agents of Toledo Edison; even if the landlords were

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<sup>3</sup> The test originally contained a fourth element addressing the reasonableness of the landlord's charges. The Commission subsequently eliminated the fourth element. See *Brooks*, 1996 Ohio PUC Lexis 292 at \*23 (May 8, 1996).

agents of Toledo Edison, the “assumed agency relationship does not transform [the landlord] into a public utility subject to [the Commission’s] jurisdiction.” *Id.*

The commercial tenants also sued Toledo Edison because Toledo Edison failed to enforce its tariff that contained a restriction on resale of electric service. In a separate decision, the Commission dismissed the complaint against Toledo Edison, holding that the utility company had no valid right or interest in restricting redistribution and resale by a landlord if the landlord was not acting as a public utility and the landlord owned the property on which the redistribution took place. *Brooks*, 1996 Ohio PUC LEXIS 292 at \*32 & \*41 (May 8, 1996).<sup>4</sup>

The enactment of Amended Substitute Senate Bill 3 (“SB3”) did not alter the Commission’s determinations regarding the nature and scope of functional activities that give rise to public utility status. Following its decision in *Brooks*, the Commission stated, “[N]othing in SB3 ... requires or warrants the Commission to change its position that such landlords are not electric light companies.” *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, PUCO Case Nos. 99-1212-EL-ETP, *et al.*, Entry at 3 (January 18, 2001) (“*FirstEnergy*”).<sup>5</sup> Additionally, the Commission concluded that a landlord was not an “aggregator” because that designation was

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<sup>4</sup> Subsequently, the General Assembly enacted R.C. 4928.40(D). That division provides: “Beginning on the starting date of competitive retail electric service, no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service.”

<sup>5</sup> See, also, *Orwell Natural Gas Co. v. Fredon Corp.*, 2015-Ohio-1212 ¶¶ 60-72 (11th Dist. Ct. App. Mar. 11, 2015) (deed restriction limiting right to procure natural gas violates public policy).

inconsistent with prior holdings and would lead to unnecessary regulation and possibly costly reconfiguration of electric facilities. *Id.*

The Commission's three-part test in landlord-tenant cases follows from the Court's admonition that the determination whether a person is a "public utility" is a mixed question of law and fact. *A & B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64 Ohio St.3d 385, 387 (1992). In the determination of whether an entity is acting as a public utility, the Court stated, "The main and frequently most important attribute of a public utility is a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service." *Id.* See, also, *Southern Ohio Power Co. v. Public Util. Comm. of Ohio*, 110 Ohio St. 246, 252 (1924). This factor requires that the business, in order to qualify as a public utility, must "provide its good or service to the public indiscriminately and reasonably." *A & B Refuse Disposers, Inc.*, 64 Ohio St.3d at 387. "The second characteristic of a public utility most often addressed by courts is whether the entity, public or private, conducts its operations in such a manner as to be a matter of public concern." *Id.* at 388. The Court, however, noted that no one factor is controlling and several factors must be weighed to determine whether the company's business is conducted in such a manner as to become a matter of public concern. *Id.*

As this case law demonstrates, the Court and the Commission have long recognized that factual differences matter. Simply labelling something as a "utility service" is not sufficient to support a determination that a particular arrangement should be subject to and receive the benefits of public utility status.<sup>6</sup>

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<sup>6</sup> See, also, *In the Matter of the Commission Investigation into the Resale and Sharing of Local Exchange Telephone Service*, Case No. 85-1199-TP-COI, 1986 Ohio PUC LEXIS 39 at \*12 (Aug. 19, 1986) (shared



As a practical matter, these differences in regulation are important to business operations. Not all arrangements that allow an ultimate consumer of electricity, natural gas, water, or wastewater treatment services to obtain such service from or through another consumer or separate entity have a purpose, nature, or scope that is sufficient to cause the arrangement to fall within the common law or statutory definition of a “public utility.” It is often the case in Ohio that multiple non-residential consumers are located on property, such as a campus, which includes facilities, plant, and equipment that allow each consumer to receive electricity, natural gas, water or wastewater treatment services through a “master-meter,” or jointly or individually owned facilities, plant, or equipment. These arrangements arise voluntarily and have become more common over time because corporations have spun off or separated individual business units that may have separate corporate identities even if commonly owned. Typically, these arrangements are ancillary to and not the primary purpose of the relationship between the individual non-residential consumers.

Under well-understood Ohio statutes and judicial and administrative orders, these arrangements are not and should not be subject to the Commission’s regulatory supervision. Under the general standards identified by the Court, the private arrangements are not provided to the public indiscriminately and are not a matter of general public concern. Under the *Shroyer* test, the parties to the private arrangements do not seek to secure the benefits of utility status, they limit the arrangements to a defined set of participants, and the shared services are ancillary to the parties’ main

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tenant services where a third-party provides telecommunications services to the occupants of multi-tenant buildings, complexes, or developed properties through a private branch exchange are not subject to Commission regulation) and R.C. 4905.90(K) (operator of a master-metered natural gas system is not a public utility or a natural gas company for purposes of R.C. 4905.90 to 4905.96).

businesses. These private arrangements, therefore, fall outside the factors both the Court and the Commission have used to determine whether an entity or its agent should be deemed a public utility.

In summary, the Commission's jurisdiction is defined by statute, and the Commission is without authority to expand its jurisdiction. The application of the Commission's jurisdiction and authority to regulate entities or their agents that may be providing submetering services is a mixed question of law and fact and turns on whether that entity is providing services "indiscriminately" to the public and in such a way as to be a matter of public interest. Private agreements such as shared service arrangements at industrial sites currently do not trigger Commission supervision or any need for it. As the Commission considers the application of the *Shroyer* test to submetering, therefore, it should continue to assure that the private arrangements are not inadvertently swept under Commission jurisdiction.

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

The Commission may assert jurisdiction as defined by statute. The Commission cannot exceed that jurisdiction and sweep in activities that it may find problematic, but that are not within its jurisdiction. Thus, the third question the Commission has presented requires first a finding that the Commission has jurisdiction over an entity that is engaged as a public utility within the meaning of Ohio law. The Commission cannot "assert jurisdiction" it does not have.

In any case, the practical consequence of a finding that an entity or its agent is a public utility would subject the entity to the Commission's regulation. In some instances, the Commission may be ill-equipped to address the matters presented by the parties to

a dispute. As the Commission recognized in *Brooks*, for example, a decision to treat the commercial landlord as a public utility would insert the Commission into the business of regulating landlord-tenant relationships, a role better left to the courts through the application of general civil laws.<sup>7</sup> *Brooks*, Entry at 6 (Mar. 16, 1995). The Commission, thus, has noted the practical considerations that are raised by an assertion of jurisdiction into privately negotiated rental arrangements that do not affect the public interest.

In the past, the Commission has not asserted jurisdiction over privately arranged shared service agreements. See *In the Matter of the Application of The Procter & Gamble Company for Relief From Compliance With the Obligations Imposed by Title 49 of the Ohio Revised Code*, Case No. 03-725-HC-ARJ, Entry at 2 (Apr. 10, 2003). The Commission has correctly found that these arrangements are ancillary and do not trigger Commission regulation. Additionally, there is not a demonstrated public interest in regulating these arrangements. Accordingly, the Commission should draw narrowly any claims of jurisdiction regarding submetering in this investigation so that shared service arrangements used by industrial and other customers are not drawn under Commission regulation when such supervision is not warranted.

### **III. CONCLUSION**

Under Ohio law, there is no categorical answer to the question of whether any entity or its agent is a public utility subject to Commission jurisdiction. In the close case, in particular, the Commission must be sensitive to the variety of voluntary ancillary

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<sup>7</sup> If the particular transaction is not subject to Commission regulation, it does not follow that the parties cannot regulate themselves or seek remedies provided by other Ohio statutes. For example, landlord-tenant law, see R.C. Chapter 5321, condominium law, see R.C. Chapter 5311, and contract law may provide private remedies.

relationships that have developed based on the understanding that these ancillary relationships are not subject to Commission regulation.

Respectfully submitted,

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**ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document. In addition, I hereby certify that a service copy of the foregoing *Initial Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the parties of record this 21<sup>st</sup> day of January 2016, *via* electronic transmission in Case No. 15-697-EL-CSS.

/s/ Frank P. Darr

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