**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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## INITIAL COMMENTS OF NATIONWIDE ENERGY PARTNERS, LLC

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Pursuant to the Public Utilities Commission of Ohio's ("Commission") Entry of December 16, 2015, Nationwide Energy Partners, LLC ("NEP") submits these Initial Comments. The Commission has requested comments from interested stakeholders, asking for responses to the following three questions:

1. Are condominium associations and similarly situated entities, including third-party agents of those entities, public utilities pursuant to the *Shroyer* test?[1]
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?
3. What impacts to customers and stakeholders would there be if the Commission were to assert jurisdiction over submetering in the state of Ohio?

NEP provides energy-related support services to apartment and condominium properties as well as tools that help developers and property managers efficiently administer these services to tenants and unit owners. For these reasons, NEP is an interested stakeholder on the issue of submetering in Ohio. NEP urges the Commission to find that it does not have jurisdiction over

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[1] *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, Opinion and Order (February 27, 1992); 1992 Ohio PUC LEXIS 137.

condominium associations, similarly situated entities, and related third parties that engage in submetering activities. Under the firmly-established *Shroyer* test, such entities who resell, redistribute, or submeter electric energy, gas/natural gas, water, etc. are not "public utilities" for purposes of the Commission's jurisdiction. Departing from *Shroyer* would contravene established Commission and Supreme Court precedent, and create significant confusion in Ohio law. Further, the exercise of jurisdiction over such entities is unnecessary and will strain the Commission's limited time and resources, compromising its ability to operate effectively.

**A. Condominium associations, similarly situated entities, and related third parties are not "public utilities" pursuant to the *Shroyer* test.**

The Commission, as a state agency, can exercise only that authority which has been specifically delegated to it by the General Assembly. *Tongren v. Pub. Util. Comm.,* 85 Ohio St.3d 87 (1999), citing *Columbus S. Power Co. v. Pub. Util. Comm.,* 67 Ohio St.3d 535, 620 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 152 (1981); and *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302 (1980). R.C. § 4905.04, expressly states that the Commission is vested with the power and jurisdiction to supervise and regulate public utilities and railroads.

In order for the Commission to have jurisdiction over condominium associations, similarly situated entities, and related third parties engaged in submetering, such entities must qualify as public utilities under Chapter 4905 of the Revised Code. R.C. § 4905.03 provides definitions for various types of public utilities, such as an "electric light company,"[2] a "water-works company,"[3]

[2] An "electric light company" is defined as one "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." R.C. § 4905.03(C).

[3] A "water-works company" is defined as one "engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state." R.C. § 4905.03(G).

and a "heating and cooling company."[4] But in the context of a landlord-tenant relationship or similar business relationship involving the purchase and redistribution of utility services to tenants or other end-users, the definitions in R.C. § 4905.03 are not self-applying. *Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 465 (2006).

In order to meaningfully apply the R.C. § 4905.03 definitions to landlords and similar entities engaged in the purchase and redistribution of utility services, the Commission—over two decades ago—crafted a three-prong test in *Shroyer*, which involved a property owner redistributing water services to mobile home tenants in its park:

1. Have the manufactured home park owners manifested an intent to be a public utility by availing themselves of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right of way for utility purposes?

2. Are the water services available to the general public rather than just to tenants residing in the manufactured home park?

3. Is the provision of water services ancillary to the primary business of operating a manufactured home park?[5]

Applying the test, the Commission found that the manufactured home park was not a water-works company, and therefore, fell outside of the Commission's jurisdiction. *Id.* In particular, the Commission concluded that the property owner had not held itself out to the general public, had not availed itself of the use of a public franchise, and the water service was ancillary to its primary business (*i.e.* being a manufactured home-park). *Id.*

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[4] A "heating or cooling company" is defined as one "engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes." R.C. § 4905.03(H).

[5] The test originally included a fourth prong, inquiring whether a separate charge was made for water services, and if so, whether it was reasonable. However, the Commission later determined that the fourth prong was not meaningful to its determination of jurisdiction, as the question becomes relevant only if the Commission has already established that it has jurisdiction. *Shroyer* at 8.

By statute, condominium associations are charged with the duty to administer the condominium property. R.C. § 5311.08. In carrying out its duties, a condominium association, through its board of directors, is empowered, among other things, to: (i) "[e]nter into contracts and incur liabilities relating to the operation of the condominium property; (ii) "impose and collect fees or other charges for the use, rental, or operation of the common elements or for services provided to unit owners"; and (iii) exercise powers that are "[c]onferred by the declaration or by the bylaws of the [condominium association] or the board of directors." R.C. §§ 5311.081(B)(3); (11); (21)(a). Through a declaration or bylaws, a condominium association may be authorized to purchase services from a utility provider for the benefit of a condominium property and charge unit owners for their share of such services on a submetered basis. Like mobile home parks, apartment buildings, and shopping centers, condominium associations that engage in utility submetering are not public utilities under the *Shroyer* test.

First, the condominium association cannot be said to have manifested an intent to be a public utility if it has not availed itself of any special benefits available to public utilities, such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or the use of a public right-of-way. Second, the utility services that the condominium association redistributes are available only to units within the condominium, rather than the public at large. Third, the supply of utility service is ancillary to the association's statutory duty to administer the condominium property.

The result is the same when a condominium association engages a third party as its agent for the purposes of arranging for the purchase of utility services, redistributing utility services to unit owners, and/or administering the collections and payments of the utility services. It is axiomatic that under Ohio law, an agent's actions, taken within the scope of the agency relationship, are

attributable to the principal. *See, e.g., Mortgage Network, Inc. v. Ameribanc Mortg. Lending, LLC*, 177 Ohio App.3d 733, 738 (10th Dist. 2008). As a condominium association is not a public utility under the *Shroyer* test, neither is the association's agent.

Moreover, even where the relationship between a condominium association and a third party involved in submetering is not rooted in strict agency principles, that third party would still fail to satisfy the three prongs of the *Shroyer* test.[6] In fact, on substantially similar facts, the Commission—applying *Shroyer*—determined that a third party engaged in submetering on behalf of a landlord is not a public utility for purposes of the Commission's jurisdiction. *See In Re: Dumeney and Felix v. Aquameter, Inc.,* Case No. 96-397-WW-CSS, Opinion and Order (Jan. 4, 2001). In *Aquameter,* the respondent, Aquameter, Inc. ("Aquameter") was a corporation engaged in the business of metering and billing for water consumption. *Id.* at 3. Aquameter had contractual agreements with two mobile home parks to install and read water meters, calculate water consumption, send out bills to tenants, and collect payments. *Id.* at 4. Aquameter did not own, lease, or operate any facilities or equipment used to supply water to the mobile home parks, nor did it have contractual agreements with the water utilities or the park tenants. *Id.* at 5.

Looking to *Shroyer*, the Commission concluded that Aquameter was not a water-works company as defined in R.C. § 4905.03, and therefore, was not subject to the Commission's jurisdiction. *Id.* at 6. The Commission found that Aquameter was operating only as a "submetering company" and that there was "no basis to conclude that Aquameter is in the business of supplying water to the public, or cause Aquameter to fit within the definition of a water-works company...."

[6] The third party, being a purchaser and redistributor of utility services in this instance, would not enjoy the special benefits available to a public utility identified in the *Shroyer* test (*i.e.,* grant of a franchise territory, certificate of public convenience and necessity, and the use of eminent domain or a public right of way for utility purposes). Moreover, the utility services are being redistributed only to the owners of the condominium units, rather than being made available to the general public.

*Id.* at 6. Likewise, a third party engaged by a condominium association for purposes of utility submetering is similarly not a public utility subject to the Commission's jurisdiction.

**B. The *Shroyer* test is firmly established in Ohio and applies when determining the Commission's jurisdiction in this investigation.**

The *Shroyer* test has been firmly rooted in Ohio law for over two decades. Since deciding *Shroyer*, the Commission has applied its test to facts involving the redistribution of utility services by an apartment complex,[7] shopping centers,[8] and a third-party submetering company.[9] In each case, the Commission not only concluded that the business entity in question was not a public utility subject to its jurisdiction, but the Commission also evaluated the issue by consistently using the *Shroyer* test. These cases demonstrate that the Commission has repeatedly endorsed its own evaluation methodology. When it comes to applying the *Shroyer* test, there is simply no meaningful distinction between a condominium association, or a third party acting on its behalf, engaged in the redistribution of utility services and any of the aforementioned business entities previously found by the Commission to fall outside of its jurisdiction. Thus, the Commission's own precedent supports continued use of the *Shroyer* test.

Moreover, the Supreme Court of Ohio recognizes that *Shroyer* is the correct test to apply when evaluating if the Commission's jurisdiction extends to a landlord or similar entity engaged in the redistribution of utility services. *See Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463 (2006).

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[7] *Pledger v. Capital Prop. Mgmt., Ltd.,* Case No. 04-1059-WW-CSS, 2004 Ohio PUC LEXIS 439, Entry (Oct. 6, 2004), Entry on Rehearing, 2004 Ohio PUC LEXIS 559 (Nov. 23, 2004), *aff'd Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463 (2006); *In re FirstEnergy,* Case No. 99-1212-EL-ETP, *et al.,* 2001 Ohio PUC Lexis 19, Entry (Jan. 18, 2001), 2001 Ohio PUC LEXIS 1157, Entry on Rehearing (Mar. 15, 2001), *aff'd FirstEnergy Corp, v. Pub. Util. Comm.*, 96 Ohio St.3d 371 (2002).

[8] *See Toledo Premium Yogurt, Inc., dba Freshens Yogurt v. The Toledo Edison Company*, Case No. 91-1528-EL-CSS, 1992 Ohio PUC LEXIS 850, Entry (Sept. 17, 1992), Entry on Rehearing, 1992 Ohio PUC LEXIS 984 (Nov 5. 1992); *Brooks v. The Toledo Edison Company*, Case No. 94-1987-EL-CSS, 1996 Ohio PUC Lexis 292, Opinion and Order (May 8, 1996), Entry on Rehearing, 1996 Ohio PUC LEXIS 410 (June 27, 1996); *In re Nader v. Colony Square Partners, Ltd.*, Case No. 99-475-EL-CSS, Entry, 1999 Ohio PUC LEXIS 188 (Aug. 26, 1999).

[9] *In Re: Dumeney and Felix v. Aquameter, Inc.,* Case No. 96-397-WW-CSS, Opinion and Order (Jan. 4, 2001).

In *Pledger*, the Court called the *Shroyer* test "significant" and emphasized that the definitions of a "water-works company" and "sewage-disposal-system company" in R.C. § 4905.03 require jurisdictional utilities to be "in the business of" "supplying" or "providing" utility services, which means more than the mere "buying and selling of commodities and services." *Pledger* at 467. A jurisdictional utility, the Court found, "is not in the 'business of' *buying and selling* an ordinary commodity or service." *Id.* (emphasis added). Instead, with regard to a water-works company or sewage-disposal-system company, the statute requires that the utility must be in the "business of *supplying* water through pipes or tubing" or the "business of [*providing*] sewage disposal services," as the case may be. *Id.* (emphasis in original). The Court went on to hold that a landlord that only bought water and sewage utility services and resold those services to its tenants was not a jurisdictional utility under R.C. § 4905.03.

Under *Pledger*, a condominium association, similarly situated entity, or a related third party engaged in the purchase of utility services and the redistribution of those services to unit owners is not in the business of "supplying" or "providing" such services, as required by R.C. § 4905.03, and therefore, is not a public utility subject to the Commission's jurisdiction.

In light of the Supreme Court's adoption of the *Shroyer* test in *Pledger*, there is no persuasive reason for the Commission to now depart from it—and with regard to condominium associations, similar entities, and related third parties—there is no basis on which to distinguish these entities from other businesses, such as apartment complexes, mobile home parks, and shopping centers that fall outside of the Commission's jurisdiction.

### C. Asserting jurisdiction over submetering would upend established law, create unnecessary regulation and confusion, and compromise the Commission's ability to operate effectively.

The *Shroyer* decision and subsequent decisions applying it are only the latest in a line of Ohio cases recognizing that landlords and similarly situated persons and entities are not public utilities when they redistribute utility services to their tenants. *See Jonas v. Swetland Co.,* 109 Ohio St. 12 (1928) (holding that landlord engaged in utility redistribution was not to a public utility); *Shopping Center Ass'n v. Pub. Util. Comm.,* 3 Ohio St. 2d 1 (1965) (shopping center that purchased and redistributed electricity was a "consumer" for purposes of R.C. § 4905.03). A reversal of course and assertion of jurisdiction under substantially similar facts would effectively contravene these decisions, creating significant confusion for consumers, utilities, and other stakeholders as to the law in Ohio on submetering, while raising serious questions concerning the Commission's authority to depart from established Supreme Court jurisprudence.

More so, even assuming that the Commission has authority (which NEP argues it does not), there is no reason to believe that there is now an urgency for the Commission to unilaterally expand its jurisdiction to cover submetering arrangements by condominium associations, similar entities, and related third parties. In *Shroyer*, the Commission observed that the redistribution of utility services was "pervasive" in Ohio. *Shroyer* at 8. That case was decided almost twenty-four years ago. Notwithstanding the apparent pervasiveness of such arrangements in the intervening time, the Ohio General Assembly has not deemed it necessary to expand the Commission's jurisdiction to cover submetering. As noted earlier, the Commission is a creature of statute, it may exercise only that jurisdiction conferred upon it by statute. *See Time Warner AxS v. Pub. Util. Comm., supra.* A departure from the status quo should fall to the Ohio General Assembly and not the Commission.

The legislature's inaction makes sense because the ultimate end users of submetered utility services already have the means to influence or outright negate such arrangements. For example, owners of condominium units may influence the actions taken by a condominium association with respect to submetering by changing the composition of the association's board of directors. R.C. § 5311.08(A)(1). Alternatively, unit owners can prohibit submetering arrangements entirely by amending the condominium's declaration or by-laws. R.C. §§ 5311.05(B)(1); 5311.08(B). Given the availability of other recourse to unit owners and similar utility service end-users, expanding the Commission's jurisdiction to cover submetering not only contravenes prevailing law but is also unnecessary.

Further, if the Commission was to assert jurisdiction over submetering arrangements in Ohio, the resulting expansion could lead to unintended or unforeseen confusion/complications. There are an unknown number of buildings in Ohio that would be affected by such a ruling. The assertion of jurisdiction would affect numerous private property rights and contractual rights as well. Moreover, the Commission would have to consider and address the fact that some submetering arrangements exist in the service territories of municipalities or rural cooperatives who provide their own utility services to customers. The Commission would also have to consider and address submetering situations where certain utilities at the property were provided by a municipality (i.e., electric service), but others provided by an entity on the rolls of the Commission (i.e., water service). These situations demonstrate some of the complexities of asserting oversight responsibility in the absence of legislative authority.

Lastly, asserting jurisdiction would strain the Commission's limited time and resources, and compromise its ability to operate effectively. In rejecting jurisdiction over a landlord engaged in submetering, the Commission noted in *Shroyer* that it "ha[s] neither the staff nor statutory authority

to insert [itself] into the landlord-tenant relationship as long as the landlord's actions are consistent with the tariffs of the regulated utility from which the service is obtained." *Shroyer* at 8-9. This reasoning still holds true with respect to the issue now under investigation. Expanding the Commission's jurisdiction to cover submetering could significantly inhibit the effectiveness of the Commission by straining its limited time and resources[10]—and more importantly—doing so would be plainly unlawful under existing Ohio law.

**D. Conclusion**

For the foregoing reasons, NEP submits that the Commission should find that it does not have jurisdiction over submetering by condominiums, similarly situated entities, and related third parties.

Respectfully submitted,

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[10] *Shroyer* went on to note that the Commission still retains the authority to regulate jurisdictional utilities providing master meter services to utility service consumers—like landlords—that redistribute utility services to ultimate end users, so as to ensure "that such service is provided to the end user in a manner consistent with the public interest." *Shroyer* at 8. However, any direct Commission jurisdiction over submetering arrangements by utility service consumers should come about through legislative action.

## CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing Initial Comments of Nationwide Energy Partners, LLC is also being served (via electronic mail) all parties who have or will be submitting initial comments in Case No. 15-1594-AU-COI on the 21st day of January, 2016, or shortly thereafter when the identity of such commenter is known.

Gretchen L. Petrucci

Summary: Comments Initial Comments electronically filed by Mrs. Gretchen L. Petrucci on behalf of Nationwide Energy Partners, LLC