**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 |

# INITIAL COMMENTS OF MARK WHITT

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## INITIAL COMMENTS OF MARK WHITT

This investigation stems from a complaint filed against Nationwide Energy Partners, LLC (NEP) in Case No. 15-697-EL-CSS. These comments refer to that proceeding as the "NEP complaint case." The NEP complaint case alleges that NEP is a public utility and competitive retail electric supplier to the North Bank condominiums. The Commission stayed the NEP complaint case and opened this investigation to "determine whether NEP and other third-party entities are operating as public utilities." Case No. 15-697-EL-CSS, Nov. 18, 2015 Entry, ¶ 13.

In a subsequent Entry of December 18, 2015, the Commission invited interested stakeholders to address three questions:

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

As the person who filed the NEP complaint case, I offer these comments for the Commission's consideration. I will reiterate that these are *my* comments. I am the managing partner of a law firm that represents clients not only before this Commission, but regulatory commissions in other states. In submitting these comments, I speak only for myself -- not for any current of former client of Whitt Sturtevant LLP.

## INTRODUCTION

Asking for stakeholder comments to a list of questions is as good a way to start an investigation as any – provided the questions do not assume conclusions to the very matters

[1] *Inscho v. Shroyer's Mobile Homes*, Case Nos. 90-182-WS-CSS, 90-252-WS-CSS, 90-350-WW-CSS (Feb. 27, 1992 Opinion and Order).

being investigated. The questions posed in this investigation fall into this trap. The questions themselves reflect conclusions that can only be drawn, if at all, at the end of an investigation, not the beginning. Three such conclusions stand out, and will be the focus of these comments.

The first conclusion, evident in the first question, is that "condominium associations and similarly situated entities" may be providing utility service to their residents, with "third-party agents" acting not for themselves, but for and on behalf of the associations. The Commission cannot draw any conclusions about the existence of an agency relationship between any "condominium association" and "third-party agent" without considering whether these entities intended to, and did, create such a relationship. There is certainly no evidence of this in the NEP complaint case, and this author is reasonably confident that no association is going to file comments defending service to its members by an alleged "agent."

A second conclusion, evident in the first and second questions, is that the Commission should be able to apply a bright-line "test" (if not the test applied in *Shroyer*, then some other test) to the information gathered in the investigation to conclusively decide whether someone (either condominium associations or their "agents") is engaged in the business of a public utility. The "test" is: "There is no test." "Whether a corporation is operating as a public utility is determined by the character of the business in which it is engaged." *Industrial Gas Corp. v. Public Util. Comm'n* (1939), 135 Ohio St. 408, syllabus ¶ 1. The factors considered in *Shroyer* were tailored to the specific facts of that case, evidencing the Commission's intent to ascertain "the character of the business" under examination. Those factors should not be (and have never been) considered a bright-line "test" to apply in cookie-cutter fashion to every situation where public utility status is at issue. The Commission may certainly consider the *Shroyer* factors in the

context of this investigation, but not to the exclusion of other relevant factors, and certainly not to the exclusion of an evidentiary record.

This last point – the lack of an evidentiary record – poses the greatest barrier between the questions posed in this investigation and meaningful answers. Each question solicits an opinion of law or policy. To render a meaningful opinion requires context; context requires facts; facts require reliable, admissible information. Allegations are not "facts" (unless admitted by the opposing party), nor are statements made in motions or responses. Very few "facts" have been established in the NEP complaint case, and this investigation provides no means to further develop a record. While I am appreciate the opportunity to submit comments, the views presented in this filing should not be considered, and are not intended, to substitute for an evidentiary record.

A third conclusion seemingly drawn by the Commission is that "submetering" and "public utility" service are somehow different and mutually exclusive. Whether the Commission should "assert jurisdiction over submetering" avoids a key issue in dispute: whether the business practice referred to by some as "submetering" is the legal and practical equivalent of "public utility" service. It is one thing to use the term "submetering" as shorthand for the service model under investigation, but the label ascribed to the service does not dictate whether it is (or should be) subject to regulation as public utility service.

The intent of these comments is not to nit-pick the Commission's questions just for the sake of being critical. The intent is to address the issues presented with the degree of rigor and critical analysis that this investigation deserves. It is my hope that these comments contribute to the investigation in a meaningful, helpful way.

## COMMENTS

These comments are presented in three sections. Section I discusses the rule of law to apply when considering whether an entity is engaged in the business of a public utility. Section II explains how agency relationships are different from the relationship NEP established to serve North Bank. The discussion in Sections I and II provide context for the responses to the Commission's questions, which appear in Section III.

## I. LEGAL CONSIDERATIONS IN DETERMINING PUBLIC UTILITY STATUS

### A. Where public utility status is at issue, Ohio law requires a case-specific inquiry into the "character of the business."

Disputes about businesses providing the service of a public utility, without submitting to regulation as a public utility, have existed since the earliest days of regulation. The rule of law that emerged from these early cases remains the law today: "Whether a corporation is operating as a public utility is determined by the character of the business in which it is engaged." *Industrial Gas Corp. v. Public Util. Comm'n* (1939), 135 Ohio St. 408, syllabus ¶ 1.

Industrial Gas operated under Commission regulation for many years, but eventually decided it could make more money by abandoning small customers and serving only industrial load. It set out to accomplish this by changing the "purpose" clause in its corporate charter and applying to the Commission for an exemption from regulation. *Id*. at 411. In seeking the exemption, Industrial Gas pointed to its newly-restricted charter as proof that it was no longer a "public" utility subject to regulation, but a "private" utility whose charter permitted it to serve industrial load only, and only then under whatever terms it negotiated with customers under "private" contracts. *Id*. The Commission denied the application. The Supreme Court of Ohio affirmed, flatly rejecting the company's claim that its charter established the character of its business. "It is what the corporation is doing rather than the purpose clause that determines

whether the business has the element of public utility." *Id*. at 412. What Industrial Gas was doing – "with its fifty miles of pipe lines running through four counties supplying nineteen industrial plants" – was sufficient to render it a public utility, so far as the court was concerned. *Id*.

Fifty years later, Atwood Resources tried a similar tactic in bypassing Columbia Gas to directly serve two industrial customers. *Atwood Resources, Inc. v. Public Util. Comm'n* (1989), 43 Ohio St. 3d 96. The Commission found that directly serving these customers amounted to public utility service. On appeal, Atwood argued that it was not a public utility because (among other reasons) its contracts with customers were "private," service was limited and not generally available to the "public," and the overall "character of its business is not that of a public utility." *Id*. at 99-101. The court disagreed. Then, as now, Title 49 defines a particular business as "[a] natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state." *Atwood* at 101. The record established that during one six-month period, Atwood billed its two customers for in excess of 23,000 mcf of gas. "Given the sizeable and recurring nature of these transactions, we conclude, as did the commission, that under any ordinary definition Atwood is *in the business* of supplying natural gas to consumers." *Id*.

Other cases could be cited, but these two are sufficient to establish the point. In determining whether a business is operating as a public utility, the Commission must consider "the character of the business," and recognize that "[e]ach case must stand upon the facts peculiar to it." *Industrial Gas*, 135 Ohio St. at 413. The Supreme Court of Ohio has never attempted to distill factors relevant to this question into a hard-and-fast rule or test.

### B. The *Shroyer* decision reflects a case-specific inquiry into the service at issue in the case.

*Shroyer* did not develop a "test" to be applied in any and all future disputes about public utility status. The Commission applied a set of factors relevant to the "character of the business" it was looking at in that particular case. These factors could be relevant in other cases, but they are not the *only* relevant factors, and they are not a substitute for examining each situation on a case-by-case basis.

In *Shroyer,* the Commission considered three questions in grappling with whether a mobile home park that metered and billed residents for water and sewer service should be considered a public utility:

- 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?

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

- Is the provision of water services ancillary to the primary business of operating a manufactured home park?[2]

[2] The *Shroyer* factors have their roots in cases that considered the definition of "public utility" in a zoning context. "Although the General Assembly exempted public utilities from zoning restrictions, it did not define 'public utility' insofar as it relates to R.C. 519.211." *Rumpke Sanitary Landfill, Inc. v. Colerain Twp*., 2012-Ohio-3914, ¶ 18, 134 Ohio St.3d 93. For purposes of R.C. 519.211, "an entity may be characterized as a public utility if the nature of its operation is a matter of public concern, and membership is indiscriminately and reasonably made available to the general public, otherwise know as public service." *Id.* at 20 (quotation omitted). Factors relevant to the "public service" inquiry include: (1) whether the business provides essential goods or services; (2) whether the public has legal right to demand or receive the goods or services; (3) whether the goods or services are provided to the public indiscriminately and reasonably; and (4) whether the business has an obligation to provide the goods or services that cannot arbitrarily or unreasonably be withdrawn. *A&B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64 Ohio St.3d 385, 387; 1992-Ohio-23. Relevant "public concern" factors include: (1) the nature of the good or service provided; (2) the degree of competition to the business, and (3) whether the business is subject to government regulation. *Id*. at 388. Applying these factors requires a "flexible rule" which "often intertwines the factors." *Rumpke* at ¶ 25, quoting *A&B Refuse* at 388. These factors are not dispositive of whether a business meets the *statutory* definition of a public utility. *Haning v. Public Util. Comm'n*, 86 Ohio St.3d 121, 128; 1999-Ohio-90 (affirming dismissal of complaint against LP gas supplier on grounds that supplier did not meet definition of public utility under R.C. 4905.03).

To the extent *Shroyer* establishes "precedent," it stands for the proposition that, where a property owner receives master meter service, the owner may individually meter and bill tenants for their use of that service, *provided*: (i) the owner complies with the applicable tariffs of the utility providing master meter service, and (ii) service is provided *only* to the owner's tenants and the owner's property. The more recent decision of *Pledger v. Public Util. Comm'n*, 109 Ohio St. 3d 463, 2005-Ohio-0105, does not expand this rule beyond the facts presented in *Shroyer*. The *Pledger* court affirmed an entry dismissing a complaint specifically because of the "similarities between the facts and legal questions in *Shroyer* and those in this case." *Id*. at ¶ 21.[3]

The tenants in *Shroyer* represented themselves, only three commissioners signed off on the decision, and the decision was not appealed. These circumstances do not render the case wholly unworthy of further consideration, but they do caution against giving the decision more weight than it deserves.

### C. The service under investigation is materially different from the service examined in *Shroyer*.

A rule of law established in a prior case cannot be applied to a present controversy without looking at the facts – in the prior case as well as the present controversy. Different facts may implicate different rules of law. *Shroyer* is pertinent to this investigation not because the facts are the same, but precisely because they are different.

There was no dispute that the owners of the *Shroyer* mobile home park earned their living by operating the park. The owners installed water and sewer meters to encourage more

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[3] To say that *Pledger* "affirmed" the *Shroyer* test (*see* Dec. 16, 2015 Entry ¶ 2) somewhat overstates the court's holding. "We . . . hold that the dismissal of the complaint was reasonable and lawful." *Pledger*, at ¶ 25. The court reasoned that because the facts were basically the same as *Shroyer*, it was reasonable to apply the same test and reach the same result. The court neither opined on the *Shroyer* test, nor suggested that if it was a proper test, it was the *only* proper test.

responsible use of this resource by tenants, who had no incentive to do so when water and sewer were provided "free" as part of their rent. *See Shroyer* at 3-4. The Commission recognized that in the particular context it was looking at, the cost of regulation exceeded any benefits. "We have neither the staff nor the statutory authority to insert ourselves into the landlord-tenant relationship . . . ." *Id*. at 8. And while the three-factor test was one consideration, it was not the only one. The decision recognizes that the tenants can be protected by means other than direct regulation of their landlord. The Commission reaffirmed its authority to "set reasonable terms and conditions on jurisdictional utilities providing master meter service so as to ensure that users of that service (e.g. landlords) are providing it to the ultimate end user in a manner which is safe and consistent with the public interest." *Id*. at 9. The Commission also recognized that the tenants had a remedy in the courts under a "comprehensive set of statutes [governing] the operation of manufactured home parks." *Id*. at 9-10, citing R.C. 3733.11(B)).

The service arrangement at North Bank is different from *Shroyer* in many different respects, but two differences are fundamental. First, any goods or services NEP provides are not "ancillary" to some other business. *Shroyer* at 7 ("[T]he distribution of water is clearly ancillary to the operation of the manufactured home park, Shroyer's main business."). The services NEP provides *are* its business. And it is a *big* business. NEP serves at least 125 multifamily developments. According to its website, "Today, we provide services to more than 30,000 residential customers in Ohio, New York, New Jersey, Pennsylvania, Kentucky and Tennessee."[4] And while *Shroyer* involved only water and sewer service, NEP supplies gas and electric service as well.

Second, NEP does not own the property where service is rendered or consumed. In *Shroyer*, ownership of the property receiving service was *the* key factor that resulted in different

[4] Nationwideenergypartners.com/about (visited Jan. 21, 2016).

findings relative to water and sewer service. The park owned the property where tenants consumed service, but by extending sewer service to just *one customer* outside the park, the Commission found that the park could be engaged in the business of a sewage disposal company. "If Respondent is providing sewer service to those who are not tenants of or affiliated with Respondent then Respondent may be operating a sewage disposal system company subject to our jurisdiction. Commission Staff should investigate this matter." *Shroyer* at 11. Consequently, it is the sewer service at issue in *Shroyer* that bears the greatest similarity to NEP's service to North Bank, not water service.

To the extent the Commission considers *Shroyer*, it should consider the *entire* decision, and consider the reasons for different outcomes between water and sewer service.

### D. Characterizing submetering companies as "agents" further distinguishes *Shroyer*.

The service arrangement in *Shroyer* involved two parties: the park owner and the tenants. The context for this investigation involves three parties: NEP, owners' associations, and residents. With respect to North Bank, NEP's workaround for this obvious distinction is to claim that it serves North Bank as the "agent" of NBCOA. (Whether any company besides NEP claims it serves as an "agent" remains to be seen.) To put this argument in context, NEP is suggesting that NBCOA is situated just like the park owner in *Shroyer*, only instead of NBCOA installing meters and billing residents itself, NBCOA hired NEP to do these things on its behalf. So, the argument goes, NBCOA and NEP are "principal and agent" on one side of the equation, and residents on the other – a two party arrangement just like *Shroyer*.

The next section of these comments explains in detail why this agency theory is flawed. For now, suffice it to say that NBCOA is *not* like the park owner in *Shroyer* because NBCOA does *not* own the property where service is rendered. All of the property at North Bank is owned

by the unit owners, either in fee simple for individual units, or as tenants in common with respect to common areas. R.C. 5311.03(B) ("A unit owner is entitled to the exclusive ownership and possession of the unit and to ownership of an undivided interest in the common elements as expressed in the declaration.") Consequently, the "agency" theory does not resolve the distinction between the service provided in *Shroyer* and how service is provided to North Bank. Adding a company to the chain of service only further distinguishes *Shroyer*, because *Shroyer* did not involve service rendered by a third party.

### E. The Commission may consider *Shroyer*, but the decision does not resolve any issue in this investigation.

May the Commission consider *Shroyer*? Of course. The decision recognizes that metering and billing tenants for their share of water consumed under a master-meter arrangement does not fall under the statutory definition of a water works company, because a landlord that limits this "service" to its tenants, on its property, is not "in the business" of supplying water. The residents of North Bank are not tenants. They own their condominiums, and have the same rights of ownership as suburban owners of single-family homes. R.C. 5311.03(A) ("Each unit of a condominium property, together with the undivided interest in the common elements appurtenant to it, is real property for all purposes and is real estate within the meaning of all provisions of the Revised Code."). And the services residents are billed for include not only water and sewer, but gas and electricity as well. The square peg that is *Shroyer* does not fit the round hole that is North Bank.

The *Shroyer* factors could be part of an analytical framework for approaching the issues raised in this investigation, but they cannot be strictly applied, nor applied to the exclusion of other factors. Indeed, the respondents in *Industrial Gas* and *Atwood* would have failed the first prong of the *Shroyer* test. "No proceedings of condemnation have ever been instituted to acquire

property or right of way" (*Industrial Gas*, 125 Ohio St. at 409), no "voluntary dedication, or some holding out, to service the public generally" was shown (*Atwood*, 43 Ohio St. 3d at 102), and neither respondent claimed a franchise or certificate to serve. The Commission and court resolved these cases by examining what the respondents *did*, not what they *said*. To resolve the questions raised here about public utility status, the Commission must have an evidentiary record that presently does not exist.

## II. AGENCY RELATIONSHIPS: WHAT THEY ARE (AND ARE NOT)

The NEP complaint case alleges that NEP is a public utility. The first question posed in this investigation shifts the main focus from NEP to "condominium associations and similarly situated entities," with secondary consideration to "third-party agents," implying that associations and their agents are one in the same. The term "agent" typically has legal significance that does not seem to be reflected in the Commission's use here. NEP's claim that it provides service "on behalf" of NBCOA does not make NEP an agent of NBCOA. Providing service under a bilateral contract does not make the service provider an "agent" of the counterparty to the contract.

### A. An agent carries out the business of its principal.

An "agency" is "a consensual fiduciary relationship between two persons where the agent has the power to bind the principal by its actions, and the principal has the right to control the actions of the agent." *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846 (internal quotation omitted). In acting on behalf of a principal, "[a]n agent owes to his principal the duty of exercising the utmost degree of fidelity, good faith, and loyalty, and, although he may gain a profit with knowledge and consent of his principal, he may not acquire an interest adverse to that of his principal and thereby reap a secret profit at his expense." *Hey v. Cummer* (1950), 89 Ohio App. 104, syllabus ¶ 6. A party that executes a contract to carry out its *own* business and in

furtherance of its *own* interests is not an "agent" of the counterparty. *See Hanson v. Kynast* (1986), 24 Ohio St. 3d 171, 174 ("Restatement of the Law 2d, Agency (1958) 73, Section 14 J, states that a buyer retains goods primarily for his own benefit, while an agent is one who retains goods primarily for the benefit of the one who delivers those goods.").

The principal-agent relationship is fundamentally different from the relationship created by a bilateral contract, which in its simplest form involves one party buying something that the other party is selling: an exchange of goods or services for money. Real estate transactions frequently involve both types of relationships, so the distinction can be easily understood in that context.

When a person buying a home and a person selling a home agree on terms and sign a contract, one party is the buyer and the other party is the seller. Neither party is an "agent" of the other. But suppose the seller uses a real estate broker. The broker agrees to market the property and negotiate a sale. If a sale closes, the broker will earn a commission. The seller and broker have created an agency relationship. The transaction now involves two contracts: (i) the purchase agreement between the buyer and seller, and (ii) the agency agreement between the seller and broker. The parties to these agreements share very different objectives, and this difference is key to understanding the significance of an agency relationship.

The parties to the purchase agreement act on their own behalf. They have adverse interests, because each approaches the bargain wanting something different. The buyer wants to pay as little as possible, but the seller wants to receive as much as possible. Each party bargains to get the best deal possible, without regard to what is "fair" for the other party.

This is not the case in an agency relationship. The parties to the agency agreement do *not* act on their own behalf. They share the *same* objective, which is to further the *principal's*

interests; *i.e.*, a quick sale at the best price. This means that if the seller wants to turn down an offer and wait for a better deal, the broker must turn down the deal. If the seller instructs the broker to accept an offer, the broker must accept the offer. And the broker is absolutely forbidden from making a side-deal with the buyer to earn a secret profit at the seller's expense.

Therein lies the key difference between the buyer-seller and principal-agent relationships. The former involves parties acting in their own interests, the latter involves an agent acting in the principal's interests. The Ohio Condominium Act, R.C. Chapter 5311, recognizes that different stakeholders have different interests in condominium property, nipping in the bud any presumption that these stakeholders may be considered "agents" of each other. "In fact, we believe that [the Ohio Condominium Act] does just the opposite – it plainly recognizes that developers, owners, and purchasers have different, and often competing, financial interests." *Belvedere Condominium Unit Owners Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274, 283; 1993-Ohio-119.

### B. Characterizing submetering companies as "agents" assumes that their "principals" decided to become service providers.

For NEP to claim that it serves a community as an "agent" of an owners' association necessarily implies that the association decided to take on the responsibility of a service provider – much like the park owners in *Shroyer* took on the responsibility of metering and billing, instead of letting the municipal provider handle these tasks directly. When NEP says that it is not the service provider to North Bank residents, but merely an "agent" of NBCOA, it is also saying that NBCOA is the service provider. That is what an agency relationship entails – an agent (NEP) carrying out the business of a principal (NBCOA).

There is certainly no evidence in the NEP complaint case to suggest that NBCOA took on the responsibility of providing service to residents, and it remains to be seen whether any

information will be provided in this investigation to allow the Commission to draw that conclusion. If an association decided to form or become a co-operative, it would surely document such a decision and communicate the decision to its members. [5]

The more likely conclusion is that NEP and its cohorts are not providing service as "agents" for the benefit of owners' associations, but as companies acting primarily for themselves to further their own interests. This is not a question of whether submetering companies provide "value" to their customers, whoever they claim those customers to be. It is a question of whether NEP supplies goods and services *as NEP, for NEP*, or whether it is merely a contractor helping owners' associations supply goods and services of the association, for the association. The latter model would be indicative of an agency. The former model would not.

In short, absent proof that owners' associations affirmatively decided to take on the responsibility of serving their members, and hired NEP to provide technical assistance to the association, the Commission can put the agency theory to rest.

### C. NEP's contracts with developers do not create an agency between NEP and owners' associations.

A more fundamental problem with the agency theory has not even been mentioned: the lack of any documentation whatsoever that NEP has *any* relationship with NBCOA, let alone an agency relationship. NEP has alluded to contracts with the *developer* of North Bank, but has not even produced them (it has instead misleadingly stated that these contracts are with NBCOA.) This is another reason to stick a fork in the agency theory. "A person claiming agency has the

[5] Ohio law excludes from the definition of "public utility" a service provider "owned and operated exclusively by and solely for the utility's customers." R.C. 4905.02(A)(2). In theory, at least, the residents at North Bank could band together to form a utility to serve themselves, and the utility would not be subject to regulation. NEP's agency theory suggests that NBCOA did just that: formed a cooperative to serve themselves, and hired NEP as an "agent" to operate it. Whether NBCOA *could* establish a cooperative is a legal question, distinct from the factual question of whether it *did*.

burden of proving the existence and extent of the agency." *Able/S.S., Inc. v. KM&E Services, Inc*., 2002-Ohio-6470; 2002 Ohio App. LEXIS 6229 (11th Dist.), citing *Irving Leasing Corp. v. M&H Tire Co.* (1984), 16 Ohio App.3d 191, 195. Moreover, "[t]here must be corroborating evidence beyond the mere assertion of an agency relationship." *Able S.S., Inc.,* citing *Toms v. Delta Sav. & Loan Assn.* (1955), 162 Ohio St. 513.

Connecting the dots between NEP's contract with the developer of North Bank and NBCOA would not establish an agency, either. To revisit the fundamentals, an agency gives the principal the right to direct and control the agent. NEP's contract with the developer does not give the developer the right to control NEP. To the contrary, NEP gets to decide how it provides service. Among other provisions of the contract[6]:

- NEP controls the price charged.
- NEP holds title to, operates and maintains the meters.
- NEP provides recommendations for CRES providers.
- NEP's consent is required to engage a CRES provider.
- NEP accounts for all commodity service purchased and delivered.
- NEP determines the quantity of service delivered to each unit.
- NEP decides the bill format.
- NEP receives all payments.
- NEP has authority to require unit owners to enter into individual billing agreements.
- NEP has authority to place liens on the property of individual unit owners.
- NEP has a license to enter the property for operations and maintenance.

NEP's contract does not give the developer sufficient control to imply an agency relationship. As in any contract, the developer can "control" NEP in the sense that it may enforce the terms of the contract, but the terms of the contract do not give the developer the right to dictate NEP's means of performance. Nor does the contract set out an objective of the *developer*, let alone terms that NEP must follow to meet those objectives.

[6] A "Commodity Coordination Service Agreement" drafted by NEP and executed by the North Bank developer was submitted as Exhibit A to the July 13, 2015 filing in the NEP complaint case styled, *Memorandum Contra Motion to Bifurcate and Motion for Limiting Instruction and Stay*.

NEP's contract with the developer is a bilateral contract that establishes the relationship of buyer and seller – or in the parlance of the contract itself, "provider" (as to NEP) and "customer" (the developer). NEP and the developer each gave something to get something– just like the buyer and seller in the hypothetical real estate transaction discussed earlier. This contract does not create an agency relationship with the developer, let alone the association.

## III. RESPONSE TO COMMISSION QUESTIONS

These comments respond to the questions in a different order than asked, starting with the second question, then the first, and ending with the third. The questions are addressed out of order not for the sake of being difficult, but to emphasize the importance of applying the appropriate legal standard.

### A. 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?

No test can be applied to any situation without first knowing what the situation is. The Commission must first understand the facts. If the facts suggest that a company may be engaged in the business of a public utility, the proper "test" is whether the "character of the business" falls within the statutory definition of a business deemed to constitute that of a "public utility." *Industrial Gas*, 135 Ohio St. 408, syllabus 1. The factors considered in *Shroyer* could be considered, but the Commission cannot limit its analysis to these factors. All facts and circumstances bearing on the "nature of its operations" are relevant. *Id*. at 413. ("Regardless of the right of the public to demand and receive service in a particular instance, the question whether a business enterprise constitutes a public utility is determined by the nature of its operations. Each case must stand upon the facts peculiar to it.")

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

The short answer to this question is, "It depends." A conclusive answer can only be provided after development of an evidentiary record, and analysis of that record in accordance with the legal standard discussed in response to the preceding question.

Speaking strictly hypothetically, however, Ohio law provides a means for customers to band together and own and operate their own facilities to serve themselves, without becoming subject to Commission regulation. Ohio law excludes from the definition of "public utility" a service provider "owned and operated exclusively by and solely for the utility's customers." R.C. 4905.02(A)(2). A condominium association or "similarly situated entity" *could* organize in a manner that would allow it to render service to itself, without being considered a "public utility." A properly organized cooperative could hire "agents" to assist the cooperative in its endeavors, without subjecting the cooperative or its agents to regulation as a public utility.

Everything just said is, of course, hypothetical. With respect to North Bank, nothing in the declarations and bylaws, association rules, development statement, or any other document or record evidences any intent or decision of NBCOA to undertake the obligations of a utility service cooperative. Moreover, whatever rights NBCOA has to form a cooperative belong to NBCOA, not NEP. A determination by the Commission that NEP is engaged in the business of a public utility would not affect, in any way, the right of a condominium association or "similarly situated entity" to form a cooperative and serve itself.

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

There is an assumption in this question that needs to be addressed before answering. Presumably, all can agree that "public utility" service falls under Commission jurisdiction. By

framing the issue as whether the Commission should "assert jurisdiction over submetering," the question assumes that "submetering" is different from "public utility" service. If this assumption is accepted at face value, the question answers itself. The Commission only has whatever jurisdiction the General Assembly gives it; the General Assembly has not defined "submetering;" ergo, the Commission lacks authority to "assert jurisdiction" over "submetering."

The focus of this investigation should not be to attempt to define "submetering" or whether that term accurately describes a certain model of service. The question that should be asked its whether the business model practiced by NEP – whatever one wishes to call it -- meets the statutory definition of the business of a public utility. If the answer is "Yes," the impacts to customers and stakeholders are a matter of letting the chips fall where they may.

## IV. CONCLUSION

The Commission did not apply its three-factor *Shroyer* test to a hypothetical situation. It held a hearing and took evidence. Understanding the facts was key to the development of a set of factors used not as a "test," but as an analytical tool for weighing the facts and applying the law. The Commission essentially applied the *Industrial Gas* standard, whether it realized it was doing so or not.

NEP is not a mom-and-pop operation. It has built a lucrative business around paying developers to allow it to install utility infrastructure and meters at their developments, arrange for the supply of utility service to these developments, and bill and collect for that service directly from the residents who end up renting or buying a unit. The advantages NEP and developers gain from these arrangements comes at the expense of residents, who are locked into a relationship with NEP from which there is no escape, other than to move. Residents are not only deprived of the right to shop for competitive gas and electric service, but are subjected to onerous and unfair terms of service – including terms that NEP cites in court to evict tenants

from their homes for nonpayment of utility bills. If a regulated EDU did this, there can be no doubt that heads would roll.

NEP has accumulated over 30,000 customers and continues to grow. It is happy to refer to itself as a "utility" when soliciting money from investors, or misleading consumers into believing that this Commission has sanctioned its practices. When faced with the prospect of regulation, however, NEP distances itself from the "utility" label as far as it can. This company and this industry work very hard to avail themselves of the benefits of being a utility, without incurring the responsibilities normally imposed on enterprises that elect to serve the public convenience and necessity.

It is time for the Commission to take action.

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Respectfully submitted,

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Summary: Comments electronically filed by Ms. Rebekah J. Glover on behalf of Mark A. Whitt