

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

² Entry at ¶1 (Dec. 16, 2015).

PUCO referenced its general authority over public utilities and its power to “prescribe any rule or order that the Commission finds necessary for protection of the public safety.”³

On September 13, 2016, the Office of the Ohio Consumers’ Counsel, Ohio Poverty Law Center, and Mark Whitt (collectively, “Consumers”) requested that the PUCO hold local public hearings on submetering. Such hearings would give a voice to the utility consumers who need – and are entitled to – the protection of the PUCO from the submetering of utility services. In fact, the PUCO asked to hear these voices in this very proceeding.⁴ Those consumers negatively affected by submetering practices should have the opportunity to bring their concerns and issues surrounding the rates, billing, and service quality of their utility service to the PUCO.

Yet, on September 28, 2016, NEP filed a memorandum contra the Consumers’ request for local public hearings. NEP seeks to prevent these voices from being heard. This would also deny the PUCO the benefit of information that would be helpful in answering the questions it posed in this docket. For the reasons discussed below, NEP’s lone argument against the Consumers’ motion is without merit. The PUCO should grant the Consumers’ motion and hold local public hearings.

II. RECOMMENDATIONS

A. NEP’s opposition to consumer testimony at local public hearings is an attempt to limit the PUCO’s investigation in this case, is unreasonable, and should be rejected.

In its memorandum contra, NEP raises only one argument against holding local public hearings. NEP argues that “[t]he question of this Commission’s jurisdiction is

³ *Id.*

⁴ Entry at ¶3 (requesting comments on impacts to customers).

purely legal, not factual.”⁵ Hence, NEP contends that “public hearings would not (and could not) assist the Commission in its determination of whether, as a legal matter, a submetering company qualifies as a ‘public utility’ subject to the Commission’s jurisdiction under R.C. 4905.03 and/or the *Shroyer* test.”⁶ NEP’s argument falls flat for numerous reasons.

It is important to remember that in its December 16, 2015, entry in this docket, the PUCO requested comments on three questions:

- (1) Are condominium associations and similarly situated entities, including third-party agents of those entities, public utilities pursuant to the *Shroyer* test;
- (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 [PUCO] apply in those situations; and
- (3) What impacts to customers and stakeholders would there be if the Commission were to assert jurisdiction over submetering in the state of Ohio.⁷

Notably, NEP’s sole argument in its memorandum contra *attempts* to address only *one aspect* of the PUCO’s first question. While NEP focuses on a legal conclusion that the PUCO must reach, it ignores the fact-finding that must support the PUCO’s investigation and conclusions on all three questions, including how the *Shroyer* test is applied. Concerning the PUCO’s first question, testimony from consumers could provide valuable insight into the nature of condominium associations in Ohio and contractual relationships they might have with submeterers. Testimony from consumers could also

⁵ Memorandum Contra at 1.

⁶ *Id.* at 2.

⁷ Entry at ¶3.

provide the PUCO with facts that can help determine whether each of *Shroyer's* three prongs are met.

Testimony from consumers at local public hearings would also benefit the PUCO's consideration of the second question – a policy decision on whether *Shroyer* is the correct test to apply in the context of submetering. Public comment at local hearings could provide the PUCO with valuable context regarding submetering in Ohio. This would help inform the PUCO on the correct policy needed to address the numerous problems associated with submetering in Ohio.

The PUCO's third question unequivocally seeks input from the public on submetering. An important way to determine the “impacts to customers” of regulating submetering services and entities is hearing directly from consumers affected by unregulated submetering. NEP seeks to silence these voices. But the PUCO has requested comments from consumers in this investigation to hear and learn about the impacts submetering has and its potential regulation would have on customers.⁸ The first-hand testimony from consumers themselves will benefit the PUCO. Therefore, the PUCO should provide Ohioans with such an opportunity at local public hearings.

Testimony from consumers at local public hearings will provide a robust factual record to which the PUCO can apply the *Shroyer* test. The PUCO should grant the Consumers' request for local public hearings in this case.

⁸ *Id.*

B. NEP's cited authority does not support its argument against holding local public hearings and toward preventing consumers from providing the PUCO with valuable information regarding its investigation in this case.

NEP argues that a determination of the PUCO's jurisdiction is "purely legal, not factual."⁹ To support this contention, NEP cites two cases.¹⁰ But the cases lend no support for NEP's position.

The first case, *In re P.N.M.*, is not applicable to the circumstances at hand. The case involved a custody dispute. There, the Fourth Appellate District declined to address an assignment of error because it found that it lacked jurisdiction to consider it.¹¹ The grounds for this finding were that the "[m]other did not appeal the March 9 dispositional judgment within thirty days."¹² This mechanical application of a statutory provision on procedure is a vastly different analysis than whether the PUCO has jurisdiction over submetering entities acting as public utilities under the three-pronged *Shroyer* test. The second case relied upon by NEP, *City of Akron v. Ohio Dep't of Ins.*, illustrates this point.

In *City of Akron*, the Tenth Appellate District reviewed an Ohio Department of Insurance determination that it had jurisdiction over certain self-funded retiree health care plans. NEP is correct that the words "[j]urisdiction is a legal question, which courts review de novo" appear in the cited decision. But a reading of the case demonstrates that in order to answer such a "legal question," it is necessary to develop and review the *facts* to which a legal standard is applied. In undertaking its de novo review of the jurisdictional question, the Tenth Appellate District conducted a thorough review of the

⁹ Memorandum Contra at 1.

¹⁰ *In re P.N.M.*, 4th Dist. Adams No. 07CA841 and 07CA842, 2007-Ohio-4976; *City of Akron v. Ohio Dep't of Ins.*, 10th Dist. Franklin Nos. 13AP-473, et al., 2014-Ohio-96.

¹¹ *In re P.N.M.*, at ¶38.

¹² *Id.* at ¶40.

relevant statutes *and the factual record* to which they were applied. This analysis is similar to the circumstances and application of the *Shroyer* test in the immediate docket. Permitting local public hearings will allow the PUCO to develop a robust factual record to which it can apply the *Shroyer* test.¹³

Implicitly, NEP has already conceded that the PUCO would (and should) perform an in-depth factual analysis in applying the *Shroyer* test. In its initial comments in this case, NEP cited to numerous Ohio Supreme Court and PUCO cases. In each of these cases, the Ohio Supreme Court and the PUCO applied the “legal” *Shroyer* test to the specific facts at hand.¹⁴ Indeed, NEP acknowledged that for over two decades “[s]ince deciding *Shroyer*, the Commission has *applied its test to facts* involving the redistribution of utility services” to various circumstances.¹⁵ Apparently fearful of the facts that could be presented at local public hearings, NEP now tries to block the PUCO from hearing these concerns. Any PUCO application of the *Shroyer* test without facts presented by consumers at local public hearings would be unjust and unreasonable.

¹³ The Consumers advocated in their initial comments that the *Shroyer* test needs to be “recalibrated” and that it is only the starting point of the analysis. As noted in earlier filings in this case, factors beyond *Shroyer* need also be considered. See Joint Comments on Protecting Ohioans from Excessive Charges from Utility Submeterers by the Office of the Ohio Consumers’ Counsel and the Ohio Poverty Law Center at 8-13 (Jan. 21, 2016); Initial Comments of Mark Whitt at 16 (Jan. 21, 2016).

¹⁴ See, e.g., *In re Inscho v. Shroyer’s Mobile Homes*, Case No. 90-182-WS-CSS, et al. Opinion and Order (Feb. 27, 1992) (making a determination on the PUCO’s jurisdiction after “having considered the testimony and exhibits presented at a public hearing in this matter, relevant provisions of the Revised Code and the Ohio Administrative Code”); *In re Pledger*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004) (in applying the tests to determine if a party is a jurisdictional public utility, the PUCO should look to established law and the “offer[s] of evidence” presented in the case); *Pledger v. PUC*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, TJ18 (reviewing the PUCO Order, the court looked to – and heavily cited – the “facts in this case”); *In re Dumeney & Felix v. Aquameter, Inc.*, Case No. 96-397-WW-CSS, Opinion and Order (Jan. 1, 2001) (developing “factual support” for its determination on each of the three-prongs of *Shroyer* at a “[two-day] fact finding conference” and evidentiary hearing, at which numerous customers of the alleged public utility testified).

¹⁵ Initial Comments of Nationwide Energy Partners, LLC at 6 (Jan. 21, 2016) (emphasis added). See also *id.* at 5 (noting that the PUCO applied the *Shroyer* test “on substantially similar facts” as in another case).

Additionally, in its reply comments in this case, NEP pointed to a purported “concession” by DP&L that it believed “most entities that engage in submetering would not qualify as jurisdiction public utilities under the *Shroyer* test.”¹⁶ This purported “concession,” however, came with an extremely important caveat – “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 [to] consumers would meet the three prongs of the *Shroyer* test.”¹⁷ Here, the PUCO is investigating submetering services and entities in Ohio. Testimony from consumers at local public hearings can provide “facts” and “fact-based data” that the PUCO needs for any application of *Shroyer*’s three-prong test to be reasonable. NEP does not explain why it seeks to prevent the public from providing facts (via local public hearings) to the PUCO that it should have for its analysis and, in fact, has explicitly requested in this investigation.

The PUCO would benefit from the development of facts in this case. For example, under the first prong, testimony from the public on how submetering entities hold themselves out to customers and whether they generally do business like regulated utilities is germane. Also, testimony about whether a submetering entity’s business primarily focuses on the provision of utility service to its customers would also help establish the third prong. There are numerous ways in which testimony from consumers at local public hearings can assist the PUCO in determining the scope of its jurisdiction over submetering entities. Therefore, the PUCO should allow consumers this opportunity to be heard and set and hold local public hearings on these important consumer issues.

¹⁶ Reply Comments of Nationwide Energy Partners, LLC at 2 (Feb. 5, 2016).

¹⁷ *Id.*

III. CONCLUSION

The PUCO's investigation regarding jurisdiction over submeterers is not just a legal process. It also involves the gathering of information concerning the operations of submeterers in Ohio. In its memorandum contra, NEP ignores the fact-gathering that the PUCO must perform in its investigation. In order to make an informed decision in this case, the PUCO should hold at least one local public hearing for consumer testimony in Columbus, regarding the reselling (submetering) of utility services in Ohio. Additional hearings in other locations should be held as appropriate. The Consumers' Joint Motion for Local Public Hearings should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Reply was served via electronic transmission to the persons listed below, on this 5th day of October 2016.

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A company that makes a tidy profit reselling electricity service to condo and apartment dwellers — critics say by gouging captive consumers — says there is no need for state regulators to hear from affected consumers.

That's not surprising. Nationwide Energy Partners is among the submetering middlemen being targeted by complaints to the Public Utilities Commission of Ohio. Of course, NEP officials wish to squelch public comment, dismissing a public hearing proposed by consumer advocates as "counterproductive." It would be, for NEP.

This state regulatory agency, created to "assure Ohioans adequate, safe and reliable public utility services at a fair price," shouldn't let them get away with it. PUCO already is accused of dragging its feet on a yearlong investigation of the still-unregulated utility reselling industry. It has before it two separately filed complaints.

One was filed last year by a Mark Whitt, a jilted consumer — who, to the submetering industry's bad luck, happens to be a lawyer who specializes in utility regulatory issues. Whitt also has filed a pending class-action lawsuit in Franklin County Common Pleas Court.

He has picked up some powerful allies in his fight against submetering companies. American Electric Power and Duke Energy told the PUCO in written testimony submitted earlier this year that it should take an aggressive regulatory stance toward submeter companies.

The utility companies wrote: "Today, a landlord or submetering company can charge rates over time in a manner that is erratic, volatile and unfair to consumers — all with impunity."

Consumers, many of who are poor and can't afford to move, report living in the dark or with heat off because their bills are so much higher than if they were buying power directly from a regulated utility such as AEP.

In April, the Office of the Ohio Consumers' Counsel, the state's top consumer advocate on utility issues, also filed a complaint at the PUCO, requesting it to restrict submetering.

The industry and landlords who profit from the business arrangement naturally oppose such regulation. Hands off, they say, arguing that submetering offsets landlords' utility technology costs and encourages residents to conserve energy, because they get individual meters.

If submeter companies truly provide a needed service, a level playing field of regulation won't kill them. But for years now, utility resellers have derailed every effort at the Statehouse toward legislative regulation. The lobbyists apparently are now turning their high beams on the PUCO to stall regulatory reform.

So yes, a public hearing is needed before public regulators, who historically have ruled in favor of utilities in 99 percent of formal complaints filed by individual consumers. PUCO should have to look Ohioans in the eye before deciding whose interests to protect: residents or brazen profiteers.

Treasurer's office in good hands

The \$2 billion that Franklin County property owners send to the Franklin County Treasurer's Office to support schools, libraries and critical social-services agencies — including those that help senior citizens and abused children — is in good hands for the time being.

Ron Hagan, an experienced and highly respected certified public accountant, was appointed to fill the vacancy created when outgoing Treasurer Ed Leonard was tapped to become the new director of the Franklin County Board of Elections. Voters will elect a new treasurer in November, but the term won't begin until next September, because state law leaves time to complete property-tax collections.

Hagan's integrity and financial background are a great fit for the office. Franklin County Democrats made a good choice.

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Summary: Reply Joint Reply to Memorandum Contra Motion for Local Public Hearings by The Office of the Ohio Consumers' Counsel, The Ohio Poverty Law Center and Mark Whitt electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.