BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING OF ONE ENERGY ENTERPRISES LLC

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Administrative Code ("O.A.C.") Rule 4901-1-35, One Energy Enterprises LLC ("One Energy") seeks rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") on December 7, 2016 (the "Order") for the following reasons:

A. The Commission's Order is unlawful and unreasonable because it denies due process to entities other than those that resell or redistribute utility services by subjecting them to potential regulation as a public utility. In the alternative, the Commission should clarify on rehearing that the Order applies only to those that resell or redistribute utility services to determine whether they are public utilities and does not apply to behind-the-meter distributed generation.

B. The Order is unlawful and unreasonable because the Commission's application and modification of the *Shroyer* test ignores long-held Ohio Supreme Court precedent that the determination of whether an entity is a public utility is a mixed question of law and fact.

As further discussed in the Memorandum in Support, attached, One Energy respectfully requests that the Commission grant rehearing and modify the Order accordingly.

Respectfully submitted on behalf of
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In its February 5, 2016 reply comments, One Energy stated that some of the initial comments in the submetering case docket were overly broad and addressed topics outside the scope of the Commission's submetering investigation. One Energy specifically requested that the Commission ensure that its decision remain within the scope of the issue of submetering.

As One Energy anticipated, soon after the Commission issued its Order[1] in this case, there were comments filed in the net metering docket insisting that the Commission's Order should be applied to services and service providers that were not even considered in this docket.[2] Namely, Buckeye Power Inc. ("Buckeye"), in the Commission's Net Metering Docket, Case No. 12-2050-EL-ORD, insisted that the Commission's Order should be applied to determine that "retail sales" of electricity by renewable developers behind-the-meter subjected those entities to Commission jurisdiction.

[1] *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI (Finding and Order) (Dec. 7, 2016).

[2] *In the Matter of the Commission's Review of Chapter 4901:1-10, Ohio Administrative Code, Regarding Electric Companies*, Case No. 12-2050-EL-ORD (the "*Net-Metering Case").*

To avoid the application of the Commission's Order in contexts it did not intend to address, One Energy asks that the Commission take this opportunity to make the following clarifications on rehearing:

1. The Commission will apply the Shroyer test to determine whether an entity is a public utility. The Commission will not apply the Shroyer test to determine whether an entity is engaging in "retail sales" or is some other type of service provider.

2. The Commission will apply the Shroyer test to those that resell or redistribute utility services. The Commission will determine whether other entities are "public utilities" on a case-by-case basis using the relevant Commission and Supreme Court case law.

Further, the Commission acted unlawfully and unreasonably by modifying the *Shroyer* test such that a failure of any one of the three prongs of the test is now sufficient to demonstrate that an entity is a public utility. This is an unwarranted departure from the purpose of the *Shroyer* test and long-held Ohio Supreme Court precedent. Therefore, the Commission should alter its Order to comport with Commission and Supreme Court precedent.

II. LAW AND ARGUMENT

A. The Commission should clarify on rehearing that the Order applies to those that resell or redistribute utility services to determine whether they are public utilities and does not apply to behind-the-meter distributed generation. Otherwise, the Commission's Order is unlawful and unreasonable because it did not provide other entities adequate due process.

On December 16, 2015, the Commission issued an Entry that defined the scope of this case. The Commission stated that this investigation was initiated to "determine scope of this Commission's jurisdiction over submetering by condominium associations and similar entities in the state of Ohio."[3] The Commission sought comments regarding its jurisdiction to regulate certain submetering activities which allegedly occur in the residential sector. The Commission's

[3] December 16, 2015 Entry at 3.

investigation centered on the *Shroyer* test, which has been applied to determine if a landlord is a "public utility."[4] Specifically, the Commission sought comments on these 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 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?[5]

During the comment period, it appeared that some parties were drifting beyond the narrow scope of the Commission's investigation. One Energy filed limited reply comments, which simply requested that the Commission "ensure that any decision it makes falls within the scope of the issue of submetering.[6] On December 7, 2016, the Commission issued its Order in this case.

As One Energy anticipated, certain parties are now using the Order in ways that the Commission likely never intended.[7] In the *Net-Metering Case*, Buckeye filed late comments which state that:

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[4] See *In re Complaints of Inscho v. Shroyer's Mobile Homes*, PUCO Case Nos. 90-182-WS-CSS, 1990 Ohio PUC LEXIS 966, Opinion and Order, (Feb. 27, 1992) ("Shroyer").

[5] December 16, 2015 Entry at 2-3.

[6] One Energy Reply Comments at 1 (February 5, 2016).

[7] See Buckeye Power, Inc.'s Motion for Leave to File Comments Out of Time Regarding Proposed Net Metering Rules ("Buckeye Motion"), (December 21, 2016), filed in the *Net-Metering Case*.

> [T]he Commission's recent order in the submetering/ subdistribution investigation requires that the Commission also assert jurisdiction over retail sales of electricity by renewable developers behind-the-meter.[8]

Buckeye also claims that:

> The Commission's recent order on submetering/subdistribution requires the Commission to similarly assert jurisdiction over retail sales of electricity occurring behind-the-meter pursuant to distributed generation power purchase agreements.[9]

The Commission should clarify that the Order does not go beyond the initial scope of the investigation. If Buckeye's tortured reading of the Order is correct, the Commission substantially expanded the scope of this case (which was initiated to address potential submetering abuses in the residential sector) by asserting that it will begin regulating all behind-the-meter distributed generation throughout Ohio. Fortunately, a review of the Order shows that Buckeye's interpretation of the Order is wrong.

First, the Order does not establish a test to determine whether an entity is engaging in "retail sales" and is therefore subject to the Commission's jurisdiction. The Order does not address whether a power purchase agreement between a self-generator and renewable developer constitutes a "retail sale." In fact, the Order does even not mention "retail sales." If the Commission is going to establish a test to determine whether an entity is engaging in "retail sales" or is some sort of retail service provider, the Commission should apply the appropriate portions of the Revised Code. It should not apply an Order that does not even mention the term "retail sale."

[8] *Id.*, at 2.

[9] *Id.*, at 15.

Second, the Commission's Order does not establish a test to determine whether behind-the-meter distributed generation is a public utility because distributed generation does not involve the "resale" or "redistribution" of electricity and does not have the characteristics of submetering companies that were the concern of this investigation. Behind-the-meter distributed generation arrangements involve generation projects which are designed for the sole use of a single customer. These distributed generation projects involve sophisticated, often commercial or industrial customers that choose to self-generate. These arrangements have nothing to do with residential customers being unwillingly subjected to unfair submetering charges or captured residential customers that are precluded from shopping for generation supply. Further, the *Shroyer* test has been applied to those that resell and redistribute electric service; not to entities like behind the meter distributed generation companies.

The Commission should immediately put an end to Buckeye's misinterpretation of the Order. It would be unlawful and unreasonable for the Commission to expand its jurisdiction over distributed generation within a case that initially had nothing to with distributed generation. This would grossly violate various entities' due process rights, and also be inconsistent with current law. Because attempts to distort the true purpose of the Order have become a reality, it is critical that the Commission clarify that its Order does not apply to behind-the-meter distributed generation. Therefore, One Energy asks that the Commission make the following clarifications on rehearing:

1. The Commission will apply the *Shroyer* test to determine whether an entity is a *public utility*. The Commission will not apply the *Shroyer* test to determine whether an entity is engaging in "retail sales" or is some other type of service provider.

2. The Commission will apply the *Shroyer* test to those that resell or redistribute utility services. The Commission will determine whether other entities are "public utilities" on a case-by-case basis using the relevant Commission and Supreme Court case law.

B. The Order is unlawful and unreasonable because the Commission's application and modification of the *Shroyer* test ignores long-held Ohio Supreme Court precedent that the determination of whether an entity is a public utility is a mixed question of law and fact.

In its Order, the Commission "clarified" that an entity's failure to satisfy any one of the three prongs of the *Shroyer* test is sufficient to demonstrate that an entity is unlawfully operating as a public utility.[10] By applying the *Shroyer* test in this way, the Commission ignores its own precedent and the precedent of the Ohio Supreme Court.

Ohio Supreme Court precedent has long held that determining whether an entity is a public utility is a mixed question of law and fact.[11] Because the definition of a "public utility" is flexible, the resolution of the question whether an enterprise is operating as a public utility is determined by an examination of the business in which it is engaged.[12] Ohio Supreme Court case law has identified a number of characteristics to be considered in this examination.

For instance, one of the most important attributes of a public utility is that it provides an essential good or service to the general public, which has a legal right to demand or receive this good or service.[13] The good or service must be provided to the public generally, which cannot

[10] Order at 1.

[11] *Marano v. Gibbs*, 45 Ohio St. 3d 310, 311 (1989).

[12] *St. Marys v. Auglaize Cty. Bd. Of Commrs.*, 115 Ohio St. 3d 387, 395 (2007).

[13] *Id.*; *A & B Refuse Disposers Inc. v. Board of Ravenna Township Trustees*, 64 Ohio St.3d 385, 387 (1992) ("The fact that a private business provides a good or service associated with the usual subject matter of a public utility does not give rise to a presumption that it is devoted to public service….Rather, in order to qualify as a public utility, the entity must, in fact, provide its good or service to the public indiscriminately and reasonably…Further, this attribute requires an obligation to provide the good or service which cannot be arbitrarily or unreasonably withdrawn…").

arbitrarily or unreasonably withdrawn for the entity to be considered a public utility.[14] Importantly, Supreme Court has found that dedication of property to public use is never presumed without evidence of unequivocal intention.[15]

Another important characteristic of a public utility often addressed by courts is whether the entity, conducts its operations in such a manner as to be a matter of public concern.[16] "Normally, a public utility occupies a monopolistic or ogopolistic position in the market place…this position gives rise to a public concern for the indiscriminate treatment of that portion of the public which needs and pays for the vital good or service offered by the entity."[17] So, in evaluating whether an entity conducts its operations in a manner as to be a public concern, courts consider a number of factors, including the good or services provided, the competition in the local marketplace, and regulation by a governmental authority.[18] Importantly, Ohio Supreme Court precedent also holds that no single factor is controlling, and that the determination of an entity's public utility status must be made on a case-by-case basis.[19]

The *Shroyer* test, as originally adopted, reflects the Ohio Supreme Court's precedent that the determination whether a person is a public utility is a mixed question of law and fact. In the underlying case, *Inscho, et al. v. Shroyer's Mobile Homes*, the plaintiff asserted that a mobile home park owner was "engaged in the business of" providing water and sewer services to

[14] *St. Marys v. Auglaize Cty. Bd. Of Commrs.*, 115 Ohio St. 3d 387, 395 (2007); *Ohio Power Co. v. Village of Attica*, 23 Ohio St.2d 37, 43 (1970).

[15] *The Southern Ohio Power Co. v. Pub. Util. Comm. of Ohio*, 110 Ohio St. 246, 251 (1924).

[16] *A & B Refuse Disposers Inc. v. Board of Ravenna Township Trustees*, 64 Ohio St.3d 385, 387 (1992).

[17] *Id*. at 388.

[18] *Id.*

[19] *St. Marys v. Auglaize Cty. Bd. Of Commrs.*, 115 Ohio St. 3d 387, 395 (2007).

Tenant's trailers.[20] Under R.C. 4905.03(G), a "water-works company" is a public utility "when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state." Likewise, under R.C. 4905.03(M), a "sewage disposal company" is a public utility "when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state." In each of these definitions, as with the other definitions in R.C. 4905.03, the triggering consideration for imposing utility status is whether an entity is "*engaged in the business of*" supplying certain services. However, "the fact that a private business provides a good or service associated with the usual subject matter of a public utility does not give rise to a presumption that the entity is a public utility…rather, in order to qualify as a public utility, the entity must, in fact, provides its good or service to the public indiscriminately and reasonably."[21] As the Supreme Court of Ohio has further stated:

> it is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating Order of a commission, convert it into a public utility or make its owner a common carrier: for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th amendment.[22]

As the case law cited above demonstrates, the determination of utility status has never been as straightforward as the statutory language might suggest, and public utility status has long been the subject of judicial interpretation.

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[20] *In re Complaints of Inscho v. Shroyer's Mobile Homes*, PUCO Case Nos. 90-182-WS-CSS, 1990 Ohio PUC LEXIS 966, Opinion and Order, (Feb. 27, 1992).

[21] *A & B Refuse Disposers Inc. v. Board of Ravenna Township Trustees,* 64 Ohio St.3d 385, 387 (1992).

[22] *The Southern Ohio Power Co. v. Pub. Util. Comm. of Ohio*, 110 Ohio St. 246, 252-253 (1924).

In *Inscho, et al. v. Shroyer's Mobile Homes*, the Commission adopted a practical and straightforward test for that recognizes the Ohio Supreme Court precedent that determining whether an entity is a public utility is a mixed question of law and fact:

> a) Has the entity manifested an intent to be a public utility by availing itself of the 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 the public right of way for utility purposes?
>
> b) Are the entity's services available to the general public, rather than limited to a specific group?
>
> c) Is the provision of the alleged utility service ancillary to the entity's primary business?

In *Shroyer*, the PUCO determined that the landlord/trailer park operator was not a public utility. The test above imports case law principles for determining public utility status as opposed to only looking at whether an entity simply supplies a certain service without considering other facts and characteristics of the entity.[23] Indeed, the dissent in *Inscho, et al. v. Shroyer's Mobile Homes* argued against the adoption of the multi-factor test, instead arguing that the Commission should only narrowly evaluate whether the landlord supplied water to the mobile home park and no other characteristics to determine public utility status.[24] Subsequently, the PUCO has applied the *Shroyer* test in multiple cases when asked to determine an entity's public utility status.[25]

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[23] See, dissent in *Inscho, et al. v. Shroyer's Mobile Homes*, which argued that the Commission should only evaluate whether the landlord supplied water to the mobile home park and no other characteristics to determine public utility status.

[24] *Id.* at 2.

[25] See e.g., *In the Matter of the Complaint of Michael E. Brooks v. The Toledo Edison Company*, Case No. 94-1987-EL-CSS (May 8, 1996); In the Matter of the Complaint of Albert A. Nader, Complainant, v. Colony Square Partners, Ltd, Case No. 99-475-EL-CSS (August 26, 1999).

In its Order, the Commission modified the *Shroyer* test by determining that an entity is a public utility if it fails a single prong of the test. This undermines the entire purpose of the *Shroyer* test by narrowing the examination of its factors and disregards precedent that multiple characteristics must be examined to determine the nature of an entity's operations.[26] The Commission's new, narrow examination is especially problematic concerning the third prong of the test. Now, in direct conflict with Supreme Court case law, an entity can be found to be a public utility if it is in the business of supplying a particular type of service, regardless of any other characteristics of the entity. In practice, this means that any company providing any sort of water service, natural gas service, or electricity service could be subjected to regulation as a public utility even though it does not exhibit the characteristics of a public utility or enjoy any of the benefits of public utility status. By departing from the original purpose of the *Shroyer* test and long-held Ohio Supreme Court precedent, the Commission's Order is unlawful and unreasonable.

III. CONCLUSION

For the reasons stated herein, One Energy respectfully requests that the Commission grant its application for rehearing.

[26] *A & B Refuse Disposers Inc. v. Board of Ravenna Township Trustees,* 64 Ohio St.3d 385, 387 (1992). ("The resolution of the question of whether an enterprise is operating as a public utility is decided by an examination of the nature of the business in which it engages. . . . Although case law provides a list of characteristics common to public utilities, it is generally recognized that none of these characteristics is controlling. That is, each case must be decided on the facts and circumstances peculiar to it. . . . Nonetheless, public utilities possess certain common attributes or characteristics which courts employ in determining the nature of an entity's operations.").

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Application for Rehearing was served upon the parties of record listed below this 6th day of January 2017 via electronic mail.

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Summary: Application for Rehearing of One Energy Enterprises LLC electronically filed by Teresa Orahood on behalf of Dylan F. Borchers