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 NATIONWIDE ENERGY PARTNERS, LLC

Pursuant to Ohio Revised Code Section ("R.C.") 4903.10 and Ohio Administrative Code Rule 4901-1-35, Nationwide Energy Partners, LLC ("NEP") submits this Application for Rehearing of the December 7, 2016 Finding and Order issued by the Public Utilities Commission of Ohio ("Commission") in this matter.

NEP files this Application for Rehearing because the Commission's December 7, 2016 Finding and Order is unreasonable and unlawful in the following respects:

1. The Commission acted unlawfully and unreasonably by failing to consider or apply its governing statutes, as interpreted by the Supreme Court of Ohio, to determine the scope of the Commission's jurisdiction over submetering.

2. The Commission acted unlawfully and unreasonably by ignoring its own precedent to determine the scope of the Commission's jurisdiction over submetering.

3. The Commission unlawfully and unreasonably concluded that the rates charged for the resale or redistribution of utility service are subject to its jurisdiction.

4. The Commission acted unlawfully and unreasonably by subjecting "any entity" that resells or redistributes public utility service to the *Shroyer* test because only the public utility customer can resell or redistribute public utility service.

5. The Commission acted unlawfully and unreasonably by modifying the third prong of the *Shroyer* test to include a consideration of charges to create a rebuttable presumption of being a public utility.

6. The Commission acted unreasonably by not clarifying that the total bill charges for a similarly situated utility customer should only be compared to the metered usage charges for the end-user of that specific utility service.

7. The Commission acted unreasonably by not requiring that any complaint regarding submetering include sufficient information to allow the threshold jurisdictional issue to be addressed prior to the merits of the complaint.

The facts and arguments that support these grounds for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

NEP appreciates and respects the Commission's interest and role in protecting public utility consumers in the state of Ohio. The Commission has a long history of protecting consumers while balancing the needs of public utilities and other interested parties in Commission proceedings. The Commission has tried to do so in this investigation proceeding, which was implemented "to determine the scope of the commission's jurisdiction over submetering by condominium associations and similar entities in the State of Ohio." December 16, 2015 Entry at ¶3. The Commission's December 7, 2016 Finding and Order, however, failed to clearly make that determination as well as other important clarifications that should be made by the Commission.

On rehearing, the Commission should render a clear jurisdictional determination starting first by relying on the 1928 holding by the Supreme Court of Ohio in *Jonas v. Swetland*, 119 Ohio St. 12 (1928), that a landlord that submetered electricity to its tenant was not a regulated public utility. This case was decided 64 years before the Commission adopted the *Shroyer* test. Likewise, in 1965, the Supreme Court of Ohio held in *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1, 4, 208 N.E.2d 923 (1965) that office buildings, apartment houses, and shopping centers that use electric energy in their own operations are the "consumer" referenced in the subdivisions of R.C. 4905.03 and that a utility cannot prevent the consumer from reselling electric energy to others "connected to them in a business way."

The Commission does not appear to have addressed this precedent along with the more recent *FirstEnergy*[1] and *Pledger*[2] cases in its December 7, 2016 Finding and Order when

[1] *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002 Ohio 4847, 775 N.E.2d 485.
[2] *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14.

considering the scope of its jurisdiction over submetering activities. The Commission also does not appear to have considered its own precedent that the Commission does not have statutory authority to regulate the resale or redistribution of utilities. *See e.g. Toledo Premium Yogurt, Inc., dba Freshens Yogurt v. The Toledo Edison Company*, Case No. 91-1528-EL-CSS, 1992 Ohio PUC LEXIS 850, Entry at *7 (Sept. 17, 1992); Entry on Rehearing, 1992 Ohio PUC LEXIS 984 at *4 (Nov 5. 1992). Both the Court's precedent and the Commission's precedent lead to the conclusion reached by Commissioner Slaby in his dissent—that the Commission is without jurisdiction to regulate submetering.

The Commission should also consider on rehearing that it is without jurisdiction to regulate the fees agreed upon between landlords and their tenants as well as the fees that condominium associations impose on the associations' members. The General Assembly has put in place statutes to regulate the contractual relationships of landlords and tenants, condominium associations and unit owners and similar entities. *See* R.C. Chapter 5311 (condominium properties); R.C. Chapter 5321 (landlord/tenant) and R.C. Chapter 4781 (manufactured home parks). Yet the Commission's Finding and Order at ¶19 expressly states that the Commission will exercise "its authority" when landlords or other entities charge unreasonably high rates or charges for the resale or redistribution of utility service.

Not only has the General Assembly not directed the Commission to intervene in these contractual relationships, but the Commission should not divert its resources to regulate landlord-tenant issues such as evictions, utility payment disputes, and billing disputes or the host of complaints that will result now that the Commission has indicated that it will exercise its authority when "landlords or other entities charge unreasonably high rates or charges …." This only makes sense because regulating submetering would potentially place the Commission in

the position of scrutinizing (and conceivably setting) the amount of a tenant's monthly rent (which could incorporate utility fees), or a condominium association's maintenance fees—activities that fall far afield of the Commission's regulatory authority. The General Assembly has wisely tasked Ohio's courts - not the Commission - with overseeing Ohio's laws concerning landlord/tenant and similar relationships.

Although the law mandates that the Commission determine that it does not have jurisdiction over submetering, at a minimum the Finding and Order should be clarified that only a utility customer taking service through a master meter who subsequently resells or redistributes the utility service will be subject to the *Shroyer* test. Service companies that are not the utility customer should not be subject to the *Shroyer* test because they do not and cannot resell or redistribute utilities.

Likewise, the Finding and Order should be clarified to remove the rebuttable presumption as to the third prong of the *Shroyer* test. Under both Commission and Supreme Court precedent, the complainant has the burden of proof and that should not change under the *Shroyer* test. If the rebuttable presumption remains, then the Commission should clarify on rehearing that under the third prong of the *Shroyer* test, the total bill charges of a similarly-situated utility customer will be compared only to the charges for the metered usage at the end-user's submeter – and exclude other charges such as charges for common areas, trash removal or landscaping care. Doing so ensures an "apples-to-apples" comparison of what the end-user is paying for a specific utility service versus what that person or entity would pay as a stand-alone utility customer.

Lastly, the Commission should modify the Finding and Order on rehearing to require any submetering complaint to contain basic information that will allow the Commission to

quickly and efficiently make the threshold jurisdictional determinations of whether the alleged public utility is reselling or redistributing public utility service and whether the Commission has jurisdiction under the *Shroyer* test. That information should include the name of the alleged public utility, the involved utility services and applicable time period covered by the Complaint along with documentation including bills and leases or similar occupancy documents.

All of the above issues, which constitute NEP's seven assignments of error, can be addressed on rehearing. Some assignments of error may be dispositive of others. But at a minimum, NEP urges the Commission to grant rehearing and modify the Finding and Order to ensure that the protections the Commission wishes to impose are consistent with Ohio law and the authority granted to the Commission by the General Assembly. Accordingly, NEP respectfully requests that the Commission grant rehearing on the seven assignments of error raised by NEP in its application for rehearing.

II. Assignment of Error No. 1:

The Commission acted unlawfully and unreasonably by failing to consider or apply its governing statutes, as interpreted by the Supreme Court of Ohio, to determine the scope of the Commission's jurisdiction over submetering.

As the Commission noted in its December 16, 2015 Entry, the purpose of this investigation is to "determine the scope of the Commission's jurisdiction over submetering by condominium associations and similar entities in the state of Ohio." December 16, 2015 Entry at ¶ 3. Yet the Commission's Finding and Order lacks any discernible legal analysis as to the scope and extent of its jurisdiction over submetering in light of the applicable statutes and case law. Had the Commission undertaken this analysis, it would have concluded that its governing statutes, as interpreted by the Supreme Court of Ohio, do not authorize the Commission to assert jurisdiction over landlords, condominiums associations, and similar utility customers who

submeter utility services to their tenants, condominium owners, or other end-users of such services.

A. The Commission only has jurisdiction over public utilities, as defined in R.C. 4905.03.

It is axiomatic that as a creature of statute, the Commission may only exercise that jurisdiction conferred upon it by statute. For the Commission to exercise jurisdiction over an entity involved in the submetering of utility services, that entity *must* qualify as a type of "public utility" as defined in R.C. 4905.03. *See* R.C. 4905.04 (noting that the Commission is vested with the jurisdiction over "public utilities."). R.C. 4905.03 defines various jurisdictional public utilities, such as an "electric light company"—defined as one "engaged in the business of *supplying* electricity for light, heat, or power purposes *to consumers* within this state";[3] a "water-works company"—defined as one "engaged in the business of *supplying* water through pipes or tubing, or in a similar manner, to *consumers* within this state";[4] a "natural gas company," defined as one "engaged in the business of *supplying* natural gas for lighting, power, or heating purposes to *consumers* within this state"[5] or a "sewage disposal company," defined as one "engaged in the business of [*providing*] sewage disposal services through pipes or tubing, and treatment works . . . within this state."[6] Importantly, as Supreme Court precedent holds, the General Assembly has not granted express authority to the Commission to regulate the reselling of utility services.

[3] R.C. 4905.03(C) (emphasis added).
[4] R.C. 4905.03(G) (emphasis added).
[5] R.C. 4905.03(D) (emphasis added).
[6] R.C. 4905.03(M).

B. The Supreme Court of Ohio has interpreted R.C. 4905.03 to find that landlords who engage in submetering by purchasing and reselling utility services to their tenants are not "suppliers," but are instead "consumers" under R.C. 4905.03, and therefore, are not jurisdictional public utilities.

The Supreme Court of Ohio has acknowledged that the public utility definitions in R.C. 4905.03, when applied to the landlord-tenant relationship, are not "self-applying" (i.e., "something more than the words of the statute is needed"). *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, at ¶ 17, 2006-Ohio-2989, 849 N.E.2d 14 (2006). The Court, however, has supplied the necessary interpretation of these statutes in the context of landlord submetering. Specifically, the Court held that a landlord who purchases utility services from a jurisdictional utility and resells those utility services to the ultimate end-user (i.e., the tenant) is not in the business of *supplying* such utility services, but instead, is itself the *consumer* of such services, which are *supplied* by the jurisdictional utility.[7] As a consumer—rather than a supplier—of utility services, the landlord or any other similar entity (such as a condominium association) who engages in submetering is *not* a public utility subject to the Commission's jurisdiction under the statutory definitions in R.C. 4905.03.

The Court most recently addressed the Commission's jurisdiction over submetering in *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14. There, the Court considered whether an apartment complex that submetered water and sewer to its tenants was a public utility (i.e., a "water-works company" and a "sewage disposal system company"). The Court concluded that the apartment complex was *not* a public utility subject to the Commission's jurisdiction.

The Court began its analysis by considering whether the apartment complex was a supplier of water or a provider of sewage disposal services to its tenant. The tenant had argued

[7] In the electricity context, for example, this would be the SSO or CRES provider with whom the landlord contracts for the provision of electric service.

that to be a jurisdictional public utility under R.C. 4905.03, the landlord had to be "in the business of supplying water or sewage disposal services," and that "in the business" meant only that the landlord was engaged in "buying and selling of commodities and services." *Pledger* at ¶ 27. The Court disagreed, finding that the extent of the landlord's activity was limited to "buying and selling of commodities and services" but that **more was required** in order for the landlord to be a *supplier* of utility services under the statute, and therefore, a jurisdictional public utility. "A utility is not in the 'business of' buying and selling an ordinary commodity or service. Instead, R.C. 4905.03(A)(8) refers to the 'business of *supplying* water through pipes or tubing, or in a similar manner.'" *Id.* (emphasis in original) (citing R.C. 4905.03(A)(8) and (A)(14). "**We cannot accept appellant's suggested definition of 'business,' which would mean that appellant's landlord, CPM, need only buy water and resell it to its tenants to become a waterworks company and that CPM need only buy sewage-disposal services and resell them to its tenants to be a sewage-disposal-system company."** *Pledger* at ¶ 28 (emphasis added). Thus, when a landlord, condominium association, or other similar entity buys and resells utility services (i.e., submeters), doing so is *not* considered the supply of utility services and therefore does not bring such entity under the Commission's jurisdiction.

Pledger also addressed who the *consumer* of the utility services was for purposes of the statutory definitions in R.C. 4905.03, which refer to the supply of utility services to consumers. Relying on the Court's prior decision in *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002 Ohio 4847, 775 N.E.2d 485, the Court held that the consumer of utility services is the landlord engaged in submetering, *not* the ultimate end-user of the submetered utility services:

> **Landlords are consumers of utility service, even though they resell that service to their tenants**. In *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002 Ohio 4847, 775 N.E.2d 485, this court held that the energy supplier was not allowed to restrict

> the resale of electric service by a landlord to a tenant if the resale took place only on the landlord's property. This court, citing precedent, held that "**office buildings, apartment houses, and shopping centers are 'consumers' of electricity even though these consumers may resell, redistribute, or submeter part of the electrical energy to their tenants.**" *Id. at P9.*
>
> Applying *FirstEnergy* to the case at bar, we hold that the landlord is the consumer of these services, even though it resold the services to its tenant.

Pledger at ¶¶ 37-38 (emphasis added).

The Court's prior decisions on submetering—some issued years before the Commission adopted the *Shroyer* test—are equally instructive. In *FirstEnergy*, the Court reasoned that landlords (in particular, shopping mall landlords) are "consumers" for purposes of R.C. 4905.03 and rejected FirstEnergy's attempt to include restrictions in its tariffs that would have prevented such landlords from reselling electricity to their tenants. The Court noted that its decision was consistent with its earlier submetering decisions, namely *Jonas v. Swetland*, 119 Ohio St. 12 (1928), which held that a landlord that submetered electricity to its tenant was not a regulated public utility, and *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1, 4, 208 N.E.2d 923 (1965), where the Court held that "we see no good reason why office buildings, apartment houses, and shopping centers, which use electric energy in their own operations, cannot fairly be classed as 'consumers' within paragraph (A), subdivision (4) of Section 4905.03 of the Revised Code, even though by submetering[,] these institutions resell a part of such electric energy to others connected to them in a business way.").

In sum, under the Supreme Court's interpretation of R.C. 4905.03, something more than the mere purchase and resale of utility services (i.e., submetering) is necessary in order for a landlord to be a *supplier* of utility services, and therefore, a public utility. Conversely, landlords or similar entities that purchase utility services from a jurisdiction utility and resell

those services to the ultimate end-user on a submetered basis are not suppliers, but are instead *consumers* under R.C. 4905.03, and therefore, cannot be public utilities under that statute.

C. The Finding and Order is unreasonable and unlawful in failing to apply the Supreme Court of Ohio's binding interpretations of R.C. 4905.03.

Although under the Finding and Order, the Commission may now assert jurisdiction over landlords or other entities when such entities "charge unreasonably high rates or charges for the resale or redistribution of utility service",[8] that pronouncement fails to consider whether the Commission's assertion of jurisdiction runs afoul of the Court's binding interpretation of R.C. 4905.03 in *Pledger*, *FirstEnergy*, or its other decisions. Indeed, the Finding and Order entirely ignores this authority, although the Commission's conclusions therein—including its creation of a rebuttable presumption that a landlord or other entity charging an "unreasonably high rate for the resale or redistribution of utility service" is a public utility—plainly runs afoul of the Court's holdings that a landlord's mere purchase and resale of utility service is not the "supply" of utility service (regardless of the resale amount), and such landlord is itself the "consumer" of the utility service, and therefore, not a public utility. Thus, the Commission's failure to consider or apply the Supreme Court of Ohio's binding interpretation of R.C. 4905.03 is unlawful and unreasonable. On rehearing, the Commission should apply these decisions to hold that it lacks jurisdiction over landlords and similar situated persons engaged in submetering within the state.

[8] Finding and Order at ¶ 19.

III. Assignment of Error No. 2:

The Commission acted unlawfully and unreasonably by ignoring its own precedent to determine the scope of the Commission's jurisdiction over submetering.

By asserting that the Commission could be vested with jurisdiction over landlords, condominium associations, and other persons depending on the amount assessed to the ultimate end-user for such submetered services, the Finding and Order not only ignores binding Ohio Supreme Court precedent, but also over two decades of the Commission's own precedent. Beginning with the eponymous decision in *Inscho v. Shroyer's Mobile Homes*, Case Nos. 90-182-WW-CSS, Opinion and Order (February 27, 1992) ("*Shroyer*"), the Commission has repeatedly found that **Ohio's statutory scheme deprives it of jurisdiction** over submetering arrangements by landlords and similarly situated persons.

In *Shroyer*, the Commission addressed whether the owner of a mobile park engaged in submetering water to the individual mobile homes was a public utility (i.e., a "water-works company") under R.C. 4905.03(A)(8). In concluding that the mobile home company was not a water-works company subject to the Commission's jurisdiction, the Commission adopted for the first time its three-prong test.[9] While finding that its test was not satisfied, the Commission went on to note that "the redistribution of what are traditionally thought to be utility services,

[9] The three prongs are as follows:

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?

Shroyer at 8.

such as water, natural gas, electricity, and telephone service, by landlords to tenants is a pervasive activity in this State" and that **"[w]e have neither the staff nor the statutory authority to insert ourselves 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 (emphasis added).

Recognizing it lacked jurisdiction over landlords engaged in submetering, the Commission noted in *Shroyer* that it could only regulate such landlord submetering **indirectly** by regulating the jurisdictional utilities from whom the landlord, as consumer, is purchasing utility services. Specifically, the Commission asserted that it "[could] set reasonable terms and conditions on jurisdictional utilities providing master meter service 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 (emphasis added).

In subsequent applications of *Shroyer*, the Commission continued to reject the notion that it has statutory jurisdiction over landlords and similar entities engaged in submetering. For example, in *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), the Commission—denying a mall tenant's complaint that the mall owner was operating as a public utility by submetering electricity service—noted that the tenant "seeks to extend our jurisdiction beyond the utility/customer relationship and employ the Commission as an arbiter of landlord-tenant disputes. We cannot agree. Pursuant to Section 4905.04 and 4905.05, we find that the Commission lacks jurisdiction over the landlords and the claims against them." *Id.* at *7. On rehearing of that decision, the Commission affirmed, noting that **"our regulation of landlord resale or redistribution practices is statutorily restricted,** but can be accomplished indirectly

through our regulation of jurisdiction public utilities." Entry on Rehearing, 1992 Ohio PUC LEXIS 984 at *4 (Nov 5. 1992) (emphasis added).

Similarly, in *Brooks v. The Toledo Edison Company*, Case No. 94-1987-EL-CSS, 1996 Ohio PUC Lexis 292, Opinion and Order (May 8, 1996), the Commission rejected Toledo Edison's attempt to restrict submetering of electric services by a mall owner through its tariffs. The Commission noted that under *Shopping Centers*, the Commission's jurisdiction extended to the regulation of Toledo Edison and its relationship with its customers (i.e., the mall owner) but that its jurisdiction did not extend further to reach the relationship between the mall owner and its tenant: "Our jurisdiction is not, however, extended beyond the public utility/customer relationship merely by the inclusion of a provision in the utility's tariff which seeks to reach beyond such relationship. **To conclude otherwise would mean that the Commission's jurisdiction may be controlled by the very utilities the Commission is charged with regulation, rather than Ohio statute.**" *Id.* at *36 (emphasis added). The Commission went on to say that "[as] a practical matter, this Commission is ill-equipped to insert itself as an arbiter of landlord/tenant disputes given our limited resources and **statutorily-restricted enforcement powers**." *Id.* (emphasis added). On rehearing, the Commission again emphasized this point, noting that the contention that it was obligated to regulate electric service to the end-user was "**simply incorrect**" and that "**our jurisdiction was limited by statute to the regulation of public utilities, and does not extend to all situations in which end-users may ultimately receive utility service**." Entry on Rehearing, 1996 Ohio PUC LEXIS 410 at *3 (June 27, 1996) (emphasis added).

This point was reiterated in *Pledger*, where the Commission applied the *Shroyer* test to find that it lacked jurisdiction over a landlord that submetered water and sewer services to its

tenants. The Commission went on to say that while it lacked the statutory jurisdiction over the landlord as a public utility, the tenant's complaints could be addressed through the "comprehensive set of statutes governing the landlord -- tenant relationship" in R.C. Chapter 5321. *Pledger v. Capital Properties Mgmt., Ltd.*, Case No. 04-1059-WW-CSS, 2004 Ohio PUC LEXIS 439, Entry (Oct. 06, 2004) at *5. On rehearing, the Commission affirmed its decision, noting that under the "well established rule in Ohio," "the landlord is the consumer referred to in Section 4905.03(A)(8)." The Commission further noted that the providers of the utility services to the landlord—the City of Akron Water Department and Summit County Department of Environmental Services—were themselves not jurisdictional entities subject to the Commission's regulations. Thus, the Commission noted, **there is both a lack of jurisdiction by this Commission over the instant situation in which the landlord is the customer of the utility, and is providing those services to its tenants,** and the fact that the utilities supplying the landlord are themselves not jurisdictional to this Commission." Entry on Rehearing, 2004 Ohio PUC LEXIS 559 (Nov. 23, 2004) at *3 (emphasis added).

While the Commission has repeatedly applied the *Shroyer* test to determine whether an entity is a public utility, it has always reached a result consistent with broader Ohio law holding that the Commission lacks jurisdiction over submetering arrangements by landlords and similarly-situated persons. Moreover, as these decisions suggest, the Commission has taken pains to acknowledge its lack of statutory jurisdiction over such entities. Nothing has changed since the Commission first issued its decision in *Shroyer*. The statutory definitions in R.C. 4905.03 remain the same, and just as importantly, the Supreme Court of Ohio's decisions interpreting those statutes have only reaffirmed that landlords and similar entities engaged in submetering fall outside the Commission's jurisdiction. In short, there is no new express

authorization from the General Assembly that would permit the Commission to assert jurisdiction over submetering at this time.

By now asserting that the Commission could be vested with jurisdiction over landlords, condominium associations, and other persons depending on the amount assessed to the ultimate end-user for such submetered utilities, the Commission has unlawfully and unreasonably disregarded over two decades of its precedent (along with that of the Supreme Court) which correctly acknowledged the Commission's lack of statutory authority over such entities.

IV. Assignment of Error No. 3:

The Commission unlawfully and unreasonably concluded that the rates charged for the resale or redistribution of utility service are subject to its jurisdiction.

Ignoring binding Supreme Court case law and its own precedent, the Commission has now decided that if a landlord, condominium association or similar entity imposes a rate for submetered utility services that exceeds a certain threshold, a rebuttable presumption will arise that the provision of these utility services is *not* ancillary to the entity's primary business, and therefore, that entity is a regulated public utility. Finding and Order at ¶ 18. The Commission's decision amounts to de facto ratemaking as to private parties over whom the Commission plainly lacks jurisdiction.

Today, the contractual relationships of landlords and tenants, condominium associations and unit owners, and similar entities are regulated elsewhere in Ohio law. *See* R.C. Chapter 5311 (condominium properties); R.C. Chapter 5321 (landlord/tenant) and R.C. Chapter 4781 (manufactured home parks). But the General Assembly has not authorized the Commission to also regulate these relationships. And as set out above, the Supreme Court of Ohio interprets R.C. Chapter 4905 to find that landlords engaged in utility submetering are not "suppliers" of

utility services, but are instead "consumers," and therefore, not regulated utilities under the applicable statutory framework.

In fact, for over two decades, the Commission has itself acknowledged that the amount that a landlord or similar entity charges to the ultimate end-user for the submetered service is irrelevant to the question of whether the Commission has jurisdiction over that entity. In *Shroyer*, Staff had proposed that the Commission consider the reasonableness of the rate assessed to the ultimate end-user for submetered utility service as a fourth prong of the Commission's test for whether an entity is a jurisdictional public utility. *See Shroyer* at *6. The Commission refused, stating that "the Commission does not believe that the fourth part of Staff's test is meaningful in determining our jurisdiction. **The reasonableness of a separate charge for water service is only meaningful if the Commission has first established that it has jurisdiction over the entity providing the service.**" *Id.* at *8 (emphasis added). And the *Shroyer* decision went on to conclude that that the Commission lacks authority over landlords engaged in utility submetering, finding that "[w]e have neither the staff **nor the statutory authority** to insert ourselves 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 (emphasis added).

The jurisdictional limitations that were in place at the time *Shroyer* was decided remain in place today. Until the General Assembly elects to give the Commission the statutory authority to regulate the submetering relationships of landlords, condominium associations, and similar entities, the Commission's attempt to engage in ratemaking as to submetering arrangements will remain unlawful and unreasonable.

V. Assignment of Error No. 4:

The Commission acted unlawfully and unreasonably by subjecting "any entity" that resells or redistributes public utility service to the *Shroyer* test because only the public utility customer can resell or redistribute public utility service.

The Commission concluded that "[i]f any entity resells or redistributes public utility service, the commission will apply the *Shroyer* test to that entity to determine if it is operating as a public utility, and then whether it is doing so unlawfully." Finding and Order at ¶ 17. The Commission also stated that it would apply the test "regardless of whether that entity considers itself a landlord, condominium association, submetering company, or some other type of business." *Id.* at 17. While the Commission does not define what constitutes a "submetering company," the language in the Finding and Order implies that the Commission will apply the *Shroyer* test to entities that are not the customer of the public utility (i.e., the customer taking service through the master meter) including submetering companies and other service providers. Such an approach is both unlawful and unreasonable.

That is because it is *only* the customer of the public utility that purchases the utility service from a regulated public utility, and then either consumes or resells that utility service to its tenants, condominium unit owners, or similar end-users of the utility service. Just as important, it is the customer of the public utility (such as the landlord or the condominium association) that then has the contractual relationship with the end-user of the utilities (such as the tenant or the condominium owner). Companies that assist the landlord, condominium association, or similar entity with billing tenants or other end-users, reading meters, and similar administrative and operational tasks are service providers only. They cannot resell or redistribute utilities as they are not the utility customer that purchases the utility service.

The Commission can address this issue by clarifying its Finding and Order to say that the Commission will only apply the *Shroyer* test to utility customers that resell or redistribute

public utility service and ***not*** to entities that are not the customer of the utility at the master meter. This clarification is further compelled by the Supreme Court of Ohio's decision in *Pledger* holding that it is not sufficient that an entity merely resell or redistribute utility service in order for that entity to be regarded as being "in the business of supplying" utility services, and therefore, a public utility under R.C. 4905.03. If the act of purchasing and redistributing utility services is not enough for a utility customer to be regarded as a public utility, it must necessarily be true that a service company, whose involvement in submetering is even more attenuated, is also not a public utility.

Therefore, because only the utility customer at the master meter can resell or redistribute the received utility, service companies cannot be regarded as regulated public utilities. The Commission should clarify its Finding and Order to clearly state that only the utility customer can resell or redistribute the utility, and that service providers such as submetering companies that are not the utility customer at the master meter are not subject to the Commission's jurisdiction.

VI. Assignment of Error No. 5:

The Commission acted unlawfully and unreasonably by modifying the third prong of the *Shroyer* test to include a consideration of charges to create a rebuttable presumption of being a public utility.

The Finding and Order adopted a rebuttable presumption that the provision of utility service is not ancillary to the landlord's or other entity's primary business if the landlord or other entity charges the end use customer a certain percentage to be determined by the Commission through this proceeding. Finding and Order at ¶18. In other words, the Commission will shift the burden of proof away from the complainant to the defendant entity if the threshold percentage is exceeded. Such a burden shift is unlawful and unreasonable.

This Commission has repeatedly held that the burden of proof in a complaint proceeding lies with the complainant. *See e.g. In the Matter of the Complaint of Faye E. Daniels*, Case No. 15-1287-EL-CSS, Opinion and Order at ¶8; *In the Matter of the Complaint of the City of Reynoldsburg, Ohio v. Columbus Southern Power Company*, Case No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 429, Opinion and Order dated April 5, 2011.

That directive originates with the Supreme Court of Ohio's 1966 statement that the "burden of proof rests upon the complainant." *Grossman v. v. Public Utilities Commission of Ohio*, 5 Ohio St. 2d 189, 190, 214 N.E.2d 666, 667; 1966 Ohio LEXIS 407. As noted by the Commission in the *Reynoldsburg* case: "[i]n complaint cases before the Commission, the complainant has the burden of proving its case." The Commission, citing to *Grossman,* then stated that "[t]hus, in order to prevail, the complainant must prove the allegations in its complaint, by a preponderance of the evidence." 2011 Ohio PUC LEXIS 429 at *6.

A complainant's burden of proof under the *Shroyer* test should be no different. Rather than the creation of a rebuttable presumption, a complainant must bear the burden of proof beyond a preponderance of evidence that the provision of utility service is not ancillary to the landlord's or other entity's business. This is in concert with the Commission's prior holdings that it will only evaluate the reasonableness of rates charged after it determines that it has jurisdiction over the public utility. The *Shroyer* test should not be modified to create a rebuttable presumption under the third prong of the test.

VII. Assignment of Error No. 6:

The Commission acted unreasonably by not clarifying that the total bill charges for a similarly situated utility customer should only be compared to the metered usage charges for the end-user of that specific utility service.

In the Finding and Order, the Commission proposed that, "if a landlord or other entity resells or redistributes utility services and charges an end use customer a threshold percentage

above the total bill charges for a similarly situated customer served by the utility's tariffed rates, an electric utility's standard service offer, or a natural gas utility's standard choice offer, then it will create a rebuttable presumption that the provision of utility service *is not* ancillary to the landlord's or entity's primary business." Finding and Order at ¶16 (emphasis in original). The Commission, however, did not clearly state that the comparison should be between the total bill charges for a similarly situated utility customer and the metered usage charges for the end-user of that specific utility service.

That comparison is necessary to ensure an "apples-to-apples" comparison. For example, a service provider to an apartment complex owner may provide billing services not only for utilities consumed at apartments but also for trash service, lighting and maintenance of common areas and landscaping care. Likewise, a condominium association may ask a service provider to provide similar billing services. Comparing the total amounts billed by an apartment complex or a condominium association to the "total bill charges for a similarly-situated customer" would not be an apples-to-apples comparison because of the many items that an apartment complex or condominium association may charge to tenants and unit owners.

To accurately compare the charges for a submetered utility such as electricity to what a similarly situated utility customer would pay, the Commission should clarify that the total bill charges for a similarly situated utility customer will only be compared to the metered usage charges for the utility service received by the end-user. Using electric as an example, the Commission would compare the total bill charges for a similarly situated utility customer to the charges assessed for electricity measured at the end-user's submeter and excluding other charges such as any charges for common areas. With that guidance, a tenant or condominium owner could make the comparison and may find that the charges for the metered usage are

similar to utility residential service. Likewise, a commercial tenant may make the same determination, and in turn, the Commission may receive fewer complaints on submetering.

VIII. Assignment of Error No. 7:

The Commission acted unreasonably by not requiring that any complaint regarding submetering include sufficient information to allow the threshold jurisdictional issue to be addressed prior to the merits of the complaint.

In *Shroyer*, the Commission noted that "… "[w]e have neither the staff nor the statutory authority to insert ourselves 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. Similarly, in *Brooks v. The Toledo Edison Company*, Opinion and Order (May 8, 1996), the Commission again stated that "[as] a practical matter, this Commission is ill-equipped to insert itself as an arbiter of landlord/tenant disputes given our **limited resources** and statutorily-restricted enforcement powers." *Id.* (emphasis added).

Having previously recognized its limited resources to monitor landlord/tenant relationships or similar relationships, the Commission should grant rehearing to protect its limited resources as well as those of all involved parties in a submetering complaint proceeding. Specifically, on rehearing, the Commission should state that it will address the threshold jurisdictional issue in any complaint proceeding first, prior to proceeding to the merits of a complaint. The Commission should also state that (1) its first jurisdictional determination will be whether the alleged public utility is reselling or redistributing utility service, and that a complaint will be dismissed if the entity is not reselling or redistributing utility service; and (2) that if the Commission determines that the alleged public utility is reselling or redistributing public utility service, it would then apply the *Shroyer* test to make a final determination on jurisdiction.

The Commission should also consider stating on rehearing that any complaint on submetering include information sufficient for the Commission to review the complaint for jurisdiction, or otherwise the complaint will be rejected. Required information should include: (1) the entity that the complaint is alleging is a public utility, (2) the public utility services the entity is alleged to be supplying, (3) the time period over which the complaint covers, (4) copies of the relevant bills redacted as necessary and (5) copies of any lease or similar documents to show proof of occupancy. Requiring this information will streamline submetering complaints and allow the Commission to quickly evaluate complaints for jurisdictional defects.

Thus, because the Commission has been vested with broad discretion to manage its dockets, it should grant rehearing to require that certain information be provided in any submetering complaint and that threshold jurisdictional determinations be made prior to a complaint case moving to the merits. *Weiss v. PUC.*, 90 Ohio St. 3d 15 at 19, 734 N.E. 2d 775, 2000 Ohio LEXIS 2272, 2000-Ohio-5 (noting Commission's broad discretion to manage its proceedings).

IX. Conclusion

The Commission may have a concern over submetering in the state of Ohio. But rather than making general statements that it will apply a modified *Shroyer* test to any entity in Ohio that resells or redistributes utility service, the Commission should have considered and applied its governing statutes as interpreted by the Supreme Court and by the Commission itself. Rehearing should be granted to allow for a definitive statement that the Commission does not have jurisdiction over submetering or over the contractual relationships between landlords and tenants, condominium associations and their members or similar entities. At a minimum, rehearing should be granted to clarify that only utility customers are subject to the *Shroyer* test,

that the burden of proof under the *Shroyer* test is with the complainant, that any comparison under the third prong of the *Shroyer* test be to the charges for the actual metered usage at the submeter and that any complaint be accompanied by the necessary information for the Commission to make the threshold determinations on jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing document was sent by or on behalf of the undersigned counsel to the following parties of record this 6th day of January, 2017 via electronic transmission.

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Summary: App for Rehearing of Nationwide Energy Partners, LLC electronically filed by Mr. Michael J. Settineri on behalf of Nationwide Energy Partners, LLC