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
MARK WHITT

In accordance with R.C. 4903.10, Mark Whitt respectfully requests rehearing of the December 7, 2016 Finding and Order (Order) issued in this proceeding. The Order is unreasonable and unlawful in the following respects:

1. The Order represents an advisory opinion, which the Commission is without jurisdiction or authority to issue.
2. The Commission lacks jurisdiction or authority to apply a "regulatory framework" that fails to fully consider the statutory definition of "public utility."

The Commission should vacate the Order. At a minimum it must revise or clarify the Order so the "regulatory framework" discussed therein reflects the statutory definition of "public utility." *See* R.C. 4905.02 and 4905.03.

A memorandum in support follows.

MEMORANDUM IN SUPPORT

The issues raised hypothetically in this investigation are also pending before the Commission in actual controversies. *See Whitt v. Nationwide Energy Partners*, Case No. 15-697-EL-CSS; *Wingo v. Nationwide Energy Partners,* Case No. 16-2401-EL-CSS. Whatever legal or practical significance the Commission intends the Order to have is not at all clear. It is this lack of clarity that compels this application for rehearing.

ARGUMENT

R.C. 4903.10 authorizes "any party" to seek rehearing of "any order" "in respect to any matters determined in the proceeding." Rehearing is sought here on two grounds.

First, the Order represents an improper advisory opinion. This is not a complaint proceeding under R.C. 4905.26. There are no "parties" in this investigation, and nothing has been "determined" that affects anyone rights (yet). The Order does not compel anyone to do anything. The Order merely represents the Commission's legal opinion about the "proper regulatory framework" for determining whether "entities are acting as public utilities when they resell or redistribute utility services."[1] The Order a classic example of an advisory opinion, which the Commission has no authority to issue, and the Supreme Court of Ohio would likely refuse to review on appeal. *White Consol. Industries v. Nichols*, 15 Ohio St.3d 7, 9 (1984).

The issues the Order addresses tentatively and hypothetically are also in dispute in the *Whitt* and *Wingo* complaint cases, so it is very likely, if not inevitable, that a party (or perhaps the Commission itself) will claim the Order is *res judicata* with respect to certain issues not only in these pending complaint cases, but in any future complaints as well. Whether the Order can be used this way is a debate for another day.

[1] Order ¶¶ 2, 1.

The second grounds for rehearing is that the Order presents a "regulatory framework" that fails to fully consider the statutory definition of "public utility." If the Commission does not vacate the Order in its entirely, it must at least revise the "regulatory framework" to comply with Ohio law.

The Commission opened this investigation under its authority to regulate "public utilities," and the central issue of this investigation is whether submetering companies are subject to regulation as "public utilities." Given that R.C. 4905.02/.03 define the term "public utility," one would expect a "complete and thorough"[2] investigation to address these statutes. The analysis at paragraphs 16 through 22 of the Order *does not even mention* them. Instead, the Order relies solely on *Inscho, et al v. Shroyer's Mobile Homes*, Case No. 90-182-ESS-CSS et al.,1992 Ohio PUC LEXIS 137 (February 27, 1992) as the framework for determining whether an entity is a public utility. These factors are *sufficient* to establish that an entity is a public utility, but they are not *exclusive.* An entity could "pass" all three prongs of the test but still fall within the statutory definition of a "public utility." In other words, the *Shroyer* factors may be considered in interpreting the statute, but they are not the *only* factors, nor even the most important.

The *Shroyer* test was developed under very different facts than those giving rise to this investigation. The Commission should determine the facts of what it is investigating and *then* establish a policy, not the other way around. "[T]he commission must, when appropriate, be willing to change its policies*." Luntz Corp. v. Public Util. Comm'n*, 79 Ohio St.3d 509, 512-13, 1997-Ohio-342.

[2] Order ¶ 7.

A. The Order is an unlawful advisory opinion.

Revised Code Title 49 gives the Commission authority to decide real disputes between real parties. No statute in Title 49 grants authority to the Commission to render decisions that consider only hypothetical disputes or abstract questions. Such advisory opinions are especially prejudicial and inappropriate when actual cases are pending before the Commission that involve the same or similar issues.

Ohio courts do not entertain actions seeking a judgment which is advisory in nature or which is based on an abstract question or a hypothetical statement of facts. *Bilyeu v. Motorists Mutual Ins. Co.* 36 Ohio St. 2d 35 (1973). Nor will the Supreme Court of Ohio review decisions based on hypothetical facts or which are advisory in nature. "Until the parties can come forward with a specific factual setting, without strictly resorting to hypotheticals and speculation, this cause does not present a justiciable controversy. This court is not inclined to decide cases on entirely hypothetical facts and render purely advisory opinions." *White Consol. Industries v. Nichols*, 15 Ohio St.3d 7, 9 (1984).

There can be no doubt that the Order addresses abstract questions: the comments submitted in the investigation respond to three such questions posed in the initial Entry. The Order does not address an actual case or controversy; *i.e.,* a "genuine dispute between parties having adverse legal interests." *R.A.S. Entertainment v. City of Cleveland*, 130 Ohio App.3d 125, 128-29 (8th Dist. Ct. App 1998). There are not even "parties" to the case, only "interested stakeholders."[3] The Order contains no findings of fact, nor has the Commission received evidence that could be properly characterized as "fact." The Order merely offers "guidance" by announcing "new parameters for application of the *Shroyer Test* to determine if [condominium

[3] Order ¶ 22

associations, submetering companies, and other entities] are acting as public utilities when they resell or redistribute utility services."[4] The Order is plainly an advisory opinion, and although statutorily appealable as of right, the Court would likely find it non-reviewable. *See White*, *supra*, 15 Ohio St. 3d at 9.

The general grant of authority conferred by R.C. 4905.04, 4905.05 and 4905.06 does not include the authority to issue advisory opinions. "[T]he assertion of power by the Public Utilities Commission of Ohio must be construed in the light of its authority under the Ohio statutes." *Public Util. Comm'n v. United Fuel Gas Co*., 317 U.S. 456, 468 (1943); *see also Ohio Bus Line, Inc. v. Public Util. Comm'n*, 29 Ohio St. 2d 222, syllabus (1972) ("The Public Utilities Commission of Ohio possesses only such jurisdiction as is conferred by statute."). Numerous statutes grant authority to hear and decide issues in various contexts, but these contexts always involve real parties and real issues.

For example, R.C. 4905.26 authorizes complaints against "any public utility" by "any person" or "upon the initiative of the … commission." If reasonable grounds for complaint are stated, "complainants" and "the public utility" are entitled to notice and a hearing. Thus, the Commission has found, and the Court has affirmed, the dismissal of complaints presenting abstract or speculative questions. "R.C. 4905.26 allows utility practices to be challenged in the state of Ohio, but such a challenge can not be based on the assertion that at some time in the future a dispute will occur. At this time there is no dispute and, therefore, the commission properly denied appellants' request for a hearing." *City of Cleveland v. Public Util. Comm'n*, 64 Ohio St.2d 209 (1980).

[4] Order ¶ 1.

No statute authorizes the Commission to issue advisory opinions. Even if such authority could be implied, the Ohio Supreme Court will not review such opinions, so the Commission should not issue them.

B. The Commission lacks authority to adopt a "regulatory framework" that fails to fully consider the statutory definition of "public utility."

Where a statute defines a term, the Commission is required to apply the statutory definition. The *Shroyer* test makes no mention of the statutory definition of "public utility." To apply the *Shroyer* factors in a manner that excludes consideration of other relevant factors would re-define the statutory term in an unreasonable and unlawful manner.

1. R.C. 4905.02/.03 defines "public utility;" the Commission must give full effect to this definition.

R.C. 4905.02(A) says that "public utility" includes every type of entity listed in R.C. 4905.03. Different categories of public utilities are defined in R.C. 4905.03 according to the business in which they are engaged, including (for example) "[a]n electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state . . . ." R.C. 4905.03(c). Thus, any entity "engaged in the business of supplying electricity . . . to consumers" is an "electric light company," and therefore subject to regulation as a "public utility."

The terms used to define an "electric light company," or other entity listed in R.C. 4905.03, are not self-defining. *Pledger v. Public Util. Comm'n*, 109 Ohio St. 3d 463 ¶17, 2005-Ohio-0105. To determine whether an entity is "engaged in the business of" supplying a commodity listed in R.C. 4905.03, the facts of the case must be applied to the statutory definition. There is not (and given the controlling statutory language, cannot be) a bright-line, cookie-cutter test to apply in determining whether an entity is "engaged in the business of

supplying" the commodity of a "public utility." Rather, "[w]hether 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*, 135 Ohio St. 408, syllabus ¶1 (1939). Most importantly, "[e]ach case must stand upon the facts peculiar to it." *Id.* at 413.

The Commission must give full force and effect to the statutory definition of "public utility." *All* facts and evidence relevant to the "character of the business" must be taken into consideration.

2. Strictly applying the *Shroyer* factors would unreasonably limit the statutory definition of "public utility."

The Commission may consider the *Shroyer* factors to determine whether an entity is a "public utility," but it cannot rely on these factors exclusively. To do so would simultaneously exclude other relevant factors, while also giving undue consideration to common law factors that do not control the *statutory* definition.

The basic flaw with *Shroyer* is the focus on common law factors of what makes an enterprise a "public utility," without considering how these factors relate (if at all) to the statutory definition. The Ohio Supreme Court has made clear that these common law factors do not control the statutory definition. In *Haning v. Public Util. Comm'n*, 86 Ohio St.3d 121, 128; 1999-Ohio-90, the Commission dismissed a complaint against a liquid propane supplier on grounds that it was not a "public utility" as defined by R.C. 4905.03. The complainants argued that even if the respondent did not meet the statutory definition, it was a "public utility" under a two-part test previously applied by the Court; *i.e.*, "(1) the business is reasonably and indiscriminately made available to the public, and (2) the nature of the business is a matter of public concern." *Id*. at 127-28. The Commission also cited these factors for its own purposes, but the Court deemed them irrelevant:

> Both the appellants and the appellees have identified the common-law characteristics of business enterprises that have been determined to be public utilities by this and other Ohio courts for purposes other than regulation under R.C. Title 49. However, neither the appellants nor the appellees have pointed to a single decision of the commission or this court wherein a business enterprise was determined to be a public utility for purposes of application of R.C. Title 49 by reference to common-law, public-utility characteristics to the exclusion of consideration of the statutory characteristics described in R.C. 4905.03.
>
> *Id*. at 128 (footnote omitted).

Because the respondents were not "public utilities under R.C. 4905.02," "the commission properly dismissed the complaints for lack of jurisdiction over them under R.C. Title 49." *Id*. at 128.

The Court has never "affirmed" the *Shroyer* test as a one-size-fits-all approach to determining whether an entity is a public utility. The *Pledger* Court merely affirmed the use of this test in a case involving parallel facts. *Pledger v. Public Util. Comm'n*, 109 Ohio St.3d 463, 466 ¶ 21. The *Haning* Court expressly *rejected* the claim that common law factors control the statutory definition of "public utility."

The Order seems to contemplate a "regulatory framework" that considers *only* the three Shroyer factors. "The failure of any one of the three prongs of the *Shroyer Test* is sufficient to establish that a landlord or other entity is unlawfully operating as a public utility"[5] This framework is overly-restrictive. As explained below, an entity could pass all three prongs of the test and still fall within the statutory definition of a public utility. In other words, the failure of any of the *Shroyer* factors is a sufficient means of establishing that an entity is a public utility, but it is not the exclusive means.

[5] Order ¶16.

a. The availing of special benefits is not required.

For example, regarding the first factor, R.C. 4905.02/.03 does *not* require proof of intent to become a public utility by actions of the respondent "availing itself of special benefits available to public utilities."[6] The respondents in *Industrial Gas Corp. v. Public Util. Comm'n*, 135 Ohio St. 408, syllabus ¶1 (1939) and *Atwood Resources, Inc. v. Public Util. Comm'n*, 43 Ohio St. 3d 96 (1989), would have failed this test, as "[n]o proceedings of condemnation have ever been instituted to acquire property or right of way" (*Industrial Gas*, 125 Ohio St. at 409), and no "voluntary dedication, or some holding out, to service the public generally" was shown (*Atwood*, 43 Ohio St. 3d at 102). But in both cases, the Commission found (and the Court affirmed) orders that the respondents were public utilities.

The first *Shroyer* factor is basically moot for entities that have accepted a franchise or certified territory, as such actions are conclusive on the question of whether the entity is a public utility. For an entity like NEP that (among other activities) installs distribution facilities, enrolls customers, procures generation, meters and bills usage, and sends disconnection notices when necessary, the question is not, "has the entity tried to use eminent domain or use the public right of way?" The question is whether these activities support a conclusion that the entity is "engaged in the business of supplying electricity . . . to consumers within this state." The first factor is of little import for the service arrangement under investigation.

b. A holding out to the public is not required.

With regard to the second factor, R.C. 4905.02/03 does *not* require that service be offered to the "general public."[7] Again, in both *Industrial Gas* and *Atwood*, the respondents were deemed public utilities even though they did not serve the general public. *Industrial Gas* at 413

[6] *See Id*.
[7] *Id*.

("*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." (emphasis added)); *Atwood* (respondent served only two customers under private contracts). Holding out to the public may establish that an entity is operating as a public utility, but this factor is not a prerequisite to such a finding.

c. There is no requirement to be "primarily" engaged in the business of supplying public utility service.

Concerning the third factor, R.C. 4905.02/.03 does *not* provide an exemption to firms that render public utility service "ancillary" to a "primary" business.[8] The overall "character of the business" is relevant, but a complainant is not required to show that a respondent is "primarily" engaged in the business of a public utility as a condition for a finding that the respondent *is* a public utility as statutorily-defined.

The controlling statutes do not regulate public utility service in a manner that distinguishes those who supply these services as a "primary" business from those who do so as "ancillary" to some other business. And it would be quite a stretch to argue that the very same service is regulated if provided as a "primary" business, but exempt from regulation if provided as an "ancillary" business. The term "engaged in the business of" means "engaged in the business of"—not "engaged *primarily* in the business of" or "engaged *only* in the business of." *See* R.C. 4905.03(A). Whether an entity *also* happens to be engaged in the business of a "landlord" or "condominium association" or "submetering company" is of no moment.

[8] *Id.*

The Order strongly suggests that rather than merely consider the *Shroyer* factors, the Commission will apply them rigidly, with little regard for the controlling statutory definitions. If this is *not* what the Commission intends, it should clarify its intentions on rehearing.

CONCLUSION

The undersigned respectfully requests rehearing for the reasons explained above. Moreover, the Commission should follow-through on its promise to act "expeditiously"[9] so that the *Whitt* and *Wingo* complaints can move forward.

Dated: January 6, 2017

Respectfully submitted,

s/ Mark A. Whitt

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[9] Order ¶ 22.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served by electronic mail this 6th day of January, 2017 to the following:

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/s/ *Mark A. Whitt*
Mark A. Whitt

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