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

INITIAL COMMENTS OF MARK WHITT

This investigation was opened "to determine the scope of the Commission's jurisdiction over submetering."[1] Rather than answer this question, the December 7, 2016 Finding and Order (Order) lays out a path for submetering firms to evade jurisdiction. Per the Order, firms providing "public utility service" will not be subject to regulation as "public utilities" so long as they voluntarily-limit price-gouging to a "reasonable threshold percentage" in *excess* of firms that provide *the same service* at regulated, tariffed rates. The Order solicits comments on what this "reasonable threshold percentage" should be.[2] These Comments explain why the very concept of a "reasonable threshold percentage" is misguided and flawed. *Any* rate charged for a "public utility service" is subject to Revised Code Title 49, regardless of whether there are suspicions that the rate may be "unreasonably high."[3]

The Commission's authority to regulate does not depend on the rates charged by entities subject to its jurisdiction. Nor does it depend on whether a service found to be that of a "public utility" is provided "ancillary" to a non-regulated "primary business."[4] If an entity is "engaged in the business of supplying" any commodity or service listed in R.C. 4905.03(A)-(M), the entity is

[1] December 16, 2015 Entry ¶ 3.
[2] Order ¶ 22.
[3] Order ¶ 19.
[4] Order ¶ 22.

a "public utility" under R.C. 4905.02(A). A "public utility" *is* subject to regulatory jurisdiction and *is* subject to Title 49, regardless of the Commission's appetite to regulate.

COMMENTS

Before getting to substantive comments, it is necessary to address a preliminary point.

Words matter, and when it comes to statutory construction and the interpretation of Commission orders, they matter a lot. The basic question under investigation is whether a form of service generically referred to as "submetering" falls within the realm of "public utility" service. Throughout the Order, terms like "utility," "public utility," "utility service" and "public utility service" are used in a context where the intended meaning is unclear. Some of these terms have a statutory definition, but it is not always apparent whether that is the intended meaning. The vague use of terms and terminology presents tautologies such as, "[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* . . . ."[5] This phrase could mean many things, depending on the definition of the italicized terms. These Comments assume that where the Order uses a statutory term, the statutory definition is intended. *Application of Columbus S. Power Co*., Slip Opinion No. 2016-Ohio-1608, ¶448 ("Our analysis must begin with the language of the statute.")

A. The Order modifies the *Shroyer* test.

Under the Order, "if 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."[6] The Order does not say how the

[5] Order ¶ 17.
[6] Order ¶ 17.

Commission intends to apply the first two prongs of the test. The third prong would be applied in a new and unorthodox fashion.

The third-prong of the *Shroyer* test asks, "Is the provision of utility service ancillary to the landlord's primary business?"[7] The Order creates a rebuttable presumption applicable to whether service is "ancillary":

> [T]he Commission proposes that, if a landlord or other entity resells or redistributes utility services and charges [to 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.[8]

The Order also explains how this presumption may be rebutted:

> The landlord or other entity would then be provided an opportunity to overcome this rebuttable presumption by presenting evidence that the provision of utility service is, in fact, ancillary to the landlord's or other entity's primary business. For example, the landlord or other entity could present evidence demonstrating that, irrespective of an individual customer's bills, the landlord or other entity provides utility service, in the aggregate, at cost.

The Order seeks comments on where to establish the "reasonable threshold percentage." [9]

There are a host of problems with the "rebuttable presumption" approach, not the least of which is the lopsided manner in which customers bringing a claim would be required to establish the presumption on a "case-by-case basis"[10] (thereby limiting the evidence to the customer's bill), but respondents would be entitled to rebut the presumption through evidence that,

[7] Order ¶ 16.
[8] Order ¶ 16.
[9] Order ¶ 22.
[10] Order ¶ 17.

irrespective of the complainant's bill, service is provided "in the aggregate, at cost."[11] This and similar problems are beyond the scope of these Comments, and are mentioned only to avoid claims of waiver.

B. "Public utility service" is subject to regulation, whether "ancillary" or otherwise.

The Order would allow the Commission to find that an entity is a "public utility," "and then" determine that the entity (even if it provides service without filing tariffs or complying with any of the numerous other legal requirements applicable to public utilities) is not "doing so unlawfully."[12] In other words, what the Order characterizes as a "rebuttable presumption" is actually a proxy for determining whether service was rendered "unlawfully."

Thus, a submetering firm could be found to be operating as a "public utility" but not subject to any sanction, regulation, or other adverse finding simply because its rates do not exceed a "reasonable threshold percentage." If the Commission does *not* intend the Order to allow for this outcome, the Commission should say so clearly and directly in a clarifying order or on rehearing. If the Commission has contemplated this outcome, it should know that the means established to make this outcome possible is unreasonable and unlawful.

There are three major flaws in the Commission's approach. First, if an entity *is* operating as a "public utility" but has *not* followed the requirements of Title 49, then in the context of this investigation, the finding that the entity is a "public utility" conclusively establishes that the entity has acted "unlawfully." Stated differently, if the Commission were to find that a

[11] Order ¶ 18.
[12] *See* Order ¶17 ("[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.*").

submetering firm was engaged in the business of a "public utility," the fact that the firm charged *any* rate is sufficient to establish a violation of a host of provisions in Title 49.[13]

Second, an entity that supplies "utility service" is a "public utility" *with respect to that service*, regardless of whether the entity *also* supplies non-utility goods or services, or is engaged in some other "primary business." In *Shroyer*, the Commission directed Staff to investigate whether the landlord, who was found to be primarily engaged in the business of a landlord, was also engaged in the business of a sewage disposal company. The Commission had already determined that the landlord was not operating as a "public utility" with respect to *water* service. But that did not foreclose a determination of whether the landlord had been operating as a "public utility" with respect to *sewer* service. The Commission plainly recognized that a person whose primary business was operating a mobile home park could *also* be a "public utility," even though rendering sewer service to a neighboring property was "ancillary" to the "primary business" of being a landlord.

In short, the "ancillary" versus "primary" distinction is only relevant in addressing the threshold question of whether an entity is providing "public utility" service. The Order seems to suggest that where separate entities provide identical services, one on an "ancillary" basis and the other as part of a "primary business," the former is not subject to regulation, but the latter is. This is plainly wrong. Title 49 applies to *all* public utility services.

Third, to the extent the characterization of "public utility service" as "primary" or "ancillary" is of any legal significance (it is not), a conclusion one way or the other must be supported by evidence. The Order makes no attempt to explain how the amount charged for

[13] *See, e.g.*, R.C. 4905.13 (system of accounts for public utilities); R.C. 4905.22 (only rates approved by Commission may be charged); R.C. 4905.30 (schedule of rates must be filed); R.C. 4905.40 (approval required for issuance of stocks, bonds and notes).

service is relevant to whether the service is "ancillary" to a primary business. This flaw is fatal. *Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 24-25 (lack of record support for a finding justifies reversal).

If anything, the fact that a submetering firm charges rates that are the same as, or comparable to, regulated utility rates weighs heavily toward a conclusion that both are involved in the same "primary business." This is certainly the perception of the people paying the bills, and the impact on ratepayers should count for *something.*

Because the amount of a total bill provides no insight into whether service is rendered "ancillary" to a primary business, it is fair to consider what factors might. One factor could be the service provider's trade name. A business or trade name can often provide the first indication of a business's "primary activity." For example, Bank of America (NYSE: BAC) is a bank. The Goodyear Tire & Rubber Company (NYSE: GT) makes tires. American Electric Power Company, Inc. (NYSE: AEP) is an electric utility holding company. In choosing names like "Nationwide *Energy* Partners" and "American *Power & Light,*" it may reasonably be presumed that these firms intended to convey *something* about the nature of their "primary business."

Another relevant factor could be the existence and identity of substitute service providers. Regardless of what they are labeled, NEP provides services. Customers pay for those services. If NEP was not around, could customers get whatever services they currently receive from NEP from a substitute provider? Who is the substitute provider? What is the substitute provider's "primary business"? One what grounds may the substitute provider's "primary business" be distinguished from the former provider's?

If the Commission is seriously interested in determining the "primary business" of submetering firms, these are the type of questions that must be asked. It is true: such questions inexorably lead to the conclusion that an entity that does nothing else but act like a public utility—purchasing, delivering, metering, billing for, and profiting from a service statutorily subject to regulation—is a public utility. The Commission has a duty to ask these questions and answer them fairly.

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Respectfully submitted,

s/ Mark A. Whitt

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