

**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

**OHIO PARTNERS FOR AFFORDABLE ENERGY'S
MEMORANDUM CONTRA
THE APPLICATION FOR REHEARING OF
NATIONWIDE ENERGY PARTNERS, LLC**

Ohio Partners for Affordable Energy ("OPAE") herein submits to the Public Utilities Commission of Ohio ("Commission") this memorandum contra the January 6, 2017 application for rehearing of Nationwide Energy Partners, LLC ("NEP") in the above-captioned Commission-ordered investigation of submetering in the state of Ohio. In its December 7, 2016 Finding and Order in this investigation, the Commission expanded the application of its test to determine whether condominium associations, submetering companies, and other entities are operating as public utilities within the scope of the Commission's jurisdiction. The test was set forth in *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, Opinion and Order (February 27, 1992) ("*Shroyer*").

The Commission's Finding and Order is one step toward protecting residential customers from submeterers operating as public utilities but denying residential customers the protections afforded to residential customers of public utilities. The Applications for Rehearing from the Finding and Order (and the Comments filed in response to the Finding and Order's threshold percentage to establish a rebuttable presumption for which the provision of utility service is not ancillary to the landlord or

other entity's primary business) indicate that there are still issues from the Finding and Order that should be addressed. However, the Application for Rehearing of NEP should be denied outright.

In its Application for Rehearing, NEP argues that submeterers are customers of public utilities and not public utilities. NEP Application for Rehearing at 8-9. NEP argues that nothing has changed since cited Commission cases (most of which involve commercial tenants) found that landlords are customers of utilities and not utilities. *Id.* at 14. NEP argues that something more than the mere purchase and re-sale of utility services is necessary in order for a landlord to be a supplier of utility services, and therefore, a public utility. NEP argues that the Commission has no authority to “engage in ratemaking as to submetering arrangements”. *Id.* at 15. NEP also argues that the Commission may not apply the *Shroyer* test to submetering companies that assist the landlord or condominium association with billing tenants, reading meters, and similar administrative and operational tasks because such submeterers are “service providers”, not even customers, and are even further from being a public utility than a landlord who is a customer. *Id.* at 17.

The Commission clearly possesses the authority to protect residential customers caught in submetering arrangements. Ohio Administrative Code (“O.A.C.”) Rule 4901:1-18-02, which defines the application of rules authorized by Revised Code Section 4905.04, includes the following:

- (A) (t)he rules in this chapter apply to all electric, gas, and natural gas utility companies that provide service to residential customers, including residential consumers in master-metered premises, and residential consumers whose utility services are included in rental payments.

Residential customers that live in master-metered residences must be notified when the landlord fails to pay its bill and is scheduled for disconnection. O.A.C. 4901:1-18-08 defines the notice requirements in detail. The same legal authority that supports protecting residential customers in master-metered residences also justifies the extension of regulatory authority as set forth in the Commission's Finding and Order to provide additional protections to residential consumers in submetering situations that exist today.

Submetering causes substantial harm to residential customers by denying them critical protections, benefits, and choices afforded to customers of public utilities under Ohio law. The list of protections, benefits, and choices denied is quite long. Submetered rates and charges are hidden from customers and subject to no public oversight. Submetered customers often have no way of knowing what their utility charges will be because submetered rates are not set pursuant to public hearings and submetered public tariffs do not exist. Cost allocations can be based on square footage and include a share of common area costs. No due process exists for submetered residential customers to provide input into their utility rates or to complain about charges. There is no oversight of any kind and no opportunity for customers to be heard. Nothing stops a submetering entity from setting rates that are unjust, unreasonable or discriminatory. Submetering entities can hide the true cost of living in a submetered premise. A landlord can entice tenants with a low monthly rent and then make up considerable additional revenues by charging high rates for utility services that are hidden from customers and public oversight. If one tenant does not pay, other tenants may be forced to pick up that tenant's share.

Regulated utilities are permitted to disconnect service only for certain expressly enumerated reasons. O.A.C. Rule 4901:1-18-03. Regulated utilities are required by statute to provide reasonable prior notice of disconnection. R.C. 4933.122(A). For residential customers, the Commission requires that utilities provide at least fourteen days' written notice prior to disconnection and a personal visit. O.A.C. 4901:1-18-06(A). There are specific requirements for the information contained in a disconnection notice and requirements as to when disconnection may occur. Residential customers receiving utility service through submeterers lack these protections. Submetered customers also lack medical certification protection to avoid disconnection. There are no rules on when reconnection of service must occur. Submetered customers lack any ability to enter into Commission-mandated payment plans. They lack the ability to enter into income-adjusted payment plans. They are unable to qualify for the Percentage of Income Payment Plan and the Home Energy Assistance Program.

Submetered service may also be unreliable. Developers may attempt to save costs by installing equipment that would not meet reliability standards to which public utilities are subject. Submetered customers lack the protection of O.A.C. Chapter 4901:1-10, the Electric Service and Safety Standards. When there is an outage, submetered customers may be unable to identify which entity to contact and whose equipment needs repair.

Submetered customers are denied the right to shop for competitive generation supply and cannot take advantage of government aggregation or competitive Standard Service Offer ("SSO") procurement. This is at odds with the

state policy at R.C. 4928.02(B) that ensures the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, and conditions they elect to meet their needs and R.C. 4928.02(C) that ensures diversity of electric supplies and suppliers by giving consumers effective choices over the selection of those supplies and suppliers. Submetered consumers have no effective choices.

Being a public utility in Ohio brings privileges and also responsibilities. Submetering businesses operate a monopoly business from which residential customers cannot escape. Submetering businesses have no responsibility to protect and benefit residential customers like a public utility is required to do under Ohio law. Unlike regulated public utilities, which must have just and reasonable charges, there is no ceiling on what the submetering entities may charge. A submeterer is enjoying the benefits granted a public utility while evading the oversight that comes with that status. Residential customers in submetering situations are deprived of the right to statutory and administrative consumer protections and the right to shop for competitive gas and electric service, and are subjected to onerous and unfair terms of service from which there is no escape.

If a submeterer provides metering, billing and electric and gas distribution services from which a residential tenant cannot escape, it is acting like a public utility while simultaneously bypassing all of the conditions imposed by law that make an entity subject to the supervision of the Commission. NEP's Application for Rehearing demonstrates all the problems the submeterer presents today. NEP relies on cases involving commercial tenants in malls as precedent when these

commercial arrangements are irrelevant to the circumstances of residential customers caught in submetered residential premises. NEP also relies on cases that did not consider residential customer protections, benefits, and choices that are now standard practice. NEP's point that a submeterer may not even be a customer of the utility (like a landlord) but a "service provider" who is not even a customer or a landlord proves the point that Commission precedent did not address the submetering situation that residential customers may find themselves in today.

A submeterer today may own, operate, and maintain utility infrastructure and handle service restoration. A submeterer may pay developers to allow it to install utility infrastructure and meters at their developments, arrange for the supply of utility service to these developments, and bill and collect for that service directly from the residents who end up renting or buying a unit. Residents are locked into a relationship with a submeterer from which there is no escape, other than to move and sell. Residents are deprived of the right to shop for competitive gas and electric service, and are subject to onerous and unfair terms of service, including terms that a submeterer may cite in court to evict tenants from their homes for nonpayment of utility bills.

A submeterer today may issue bills to all residents belonging to a condominium association for electric, water, and sewer service on a monthly basis. The electric charges billed by the submeterer may separately list generation, transmission, and distribution components of retail electric service. The submeterer may also assess a customer charge. A submeterer may bill for electric distribution service even though it has no certified territory in which to provide electric

distribution service. A submeterer may also bill for electric generation service even though it is not a certified competitive retail generation supplier. If a submeterer is performing these functions at residential premises, the submeterer must be considered a public utility in order to protect and benefit residential customers in accordance with Ohio law.

Submetered residential customers have little or no power to confront submetering situations. These residential customers may voluntarily sign a lease or join a condominium association, but they should not be required to surrender their right to public utility service with the consumer protections that are attendant to this service for residential customers. The assertion that these are voluntary arrangements freely entered into by residential customers is not credible. Under these arrangements, a residential consumer signs away his or her rights to be a public utility customer or is denied the right to live in the location of his or her choosing. In these arrangements, if the entity providing the service is not a public utility, public utility service is unavailable to these customers.

Shroyer was inadequate to address the activities of today's submeterers. The *Shroyer* test needed revision; it was too narrow because it did not consider the characteristics exhibited by present-day submetering entities in residential housing situations. Any entities that charge for the distribution of electricity to end-use residential customers should be electric utilities. Landlords, condominium associations, and submetering companies that meter utility service and assess usage-based charges to residential tenants are acting as public utilities without being subject to Ohio utility law or Commission regulation.

Shroyer also did not address whether submetering entities occupy a monopoly position in areas where there is choice today. If a residential customer has no choice of commodity supplier and must establish a relationship with a submetering entity, there is a monopoly where there should be choice.

The Commission created the *Shroyer* test and the Commission has the authority to revise it to meet current needs. The Supreme Court accepted the *Shroyer* test but only as the Commission's expert interpretation of R.C. 4905.03, which defines public utilities. Deference was given to the Commission to interpret the statute due to the Commission's expertise. Just as the Commission developed the *Shroyer* test to implement R.C. 4905.02 and 4905.03, the Commission has now found that the *Shroyer* test is inadequate to deal with the current activities of submetering entities. Submetering harms residential utility customers in numerous ways by denying them the benefits, protections, and choices afforded customers of regulated public utilities under Ohio law.

The Commission developed the *Shroyer* test to determine whether a submetering entity is a public utility. The Commission correctly revised the *Shroyer* test to address the issues raised by current submeterers such as NEP. The Commission has the authority to protect residential customers in submetering situations. Residential customers subjected to submetering should enjoy all the rights and protections of residential customers of regulated public utilities. The Commission acted lawfully and reasonably in making this finding. For these reasons, the Application for Rehearing of NEP should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Memorandum Contra the Application for Rehearing of Nationwide Energy Partners, LLC, will be served by the Commission's Docketing Division on electronically subscribed persons via electronic transmission this 17th day of January 2017.

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Summary: Memorandum Contra Application for Rehearing of Nationwide Energy Partners LLC electronically filed by Colleen L Mooney on behalf of Ohio Partners for Affordable Energy