

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

ENTRY ON REHEARING

Entered in the Journal on February 1, 2017

I. SUMMARY

{¶ 1} The Commission grants the applications for rehearing of the December 7, 2016 Finding and Order for the purpose of further consideration of the matters specified in the applications for rehearing.

II. DISCUSSION

{¶ 2} On December 16, 2015, the Commission initiated an investigation regarding the proper regulatory framework to be applied to submetering practices with respect to condominium associations in the state of Ohio. Pursuant to R.C. 4905.06, the Commission has general supervisory authority over all public utilities within its jurisdiction and may examine such public utilities and keep informed as to their general condition, to their properties, to the adequacy of their service, to the safety and security of the public and their employees, and to their compliance with all laws, orders of the Commission, franchises, and charter requirements. Further, the Commission may prescribe any rule or order that it finds necessary for protection of the public safety.

{¶ 3} In 1992, the Commission adopted a three-part test for determining whether a company is acting as a public utility and, therefore, should be subject to the jurisdiction of this Commission in *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992). The *Shroyer Test*, which was affirmed by the Supreme Court of Ohio as reasonable in *Pledger v. PUC*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶18, is as follows:

- (a) Has the landlord manifested an intent to be a public utility by availing itself 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?
- (b) Is the utility service available to the general public rather than just to tenants?
- (c) Is the provision of utility service ancillary to the landlord's primary business?

{¶ 4} In addition to waterworks companies, the *Shroyer Test* has been applied to the provision of electric utility service. See, *In re Pledger*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004); *In re Brooks*, Case No. 94-1987-EL-ATA, Opinion and Order (May 8, 1996); *In re FirstEnergy*, Case No. 99-1212-EL-ETP, et al., Entry (Nov. 21, 2000); *FirstEnergy Corp. v. PUC*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶10, 18.

{¶ 5} In the December 7, 2016 Finding and Order in the instant case (December 7 Order), the Commission clarified that an affirmative answer to any one of the three prongs of the *Shroyer Test* is sufficient to demonstrate that an entity is unlawfully operating as a public utility. The December 7 Order also directed that interested stakeholders file comments by January 13, 2017, and reply comments by February 3, 2017, regarding a reasonable threshold percentage for the establishment of a rebuttable presumption for which the provision of utility service is *not* ancillary to the landlord's or other entity's primary business.

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters

determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 7} On January 6, 2017, applications for rehearing of the December 7 Order were filed jointly by the Industrial Energy Users-Ohio, the Ohio Hospital Association and the Ohio Manufacturers' Association, by the Ohio Consumers' Counsel with the Ohio Poverty Law Center, and by the electric utilities (Ohio Power Company, Duke Energy Ohio, Inc., and Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company), as well as separate filings by Nationwide Energy Partners, LLC, One Energy Enterprises LLC, and Mark A. Whitt. In addition, the Building Owners and Managers Associations of Greater Cleveland and of Ohio filed a joint motion for intervention and application for rehearing.

{¶ 8} The Commission grants the above-referenced applications for rehearing as we find that sufficient reasons have been set forth to warrant further consideration of the matters specified therein.

III. ORDER

{¶ 9} It is, therefore,

{¶ 10} ORDERED, That the applications for rehearing filed in this docket be granted for further consideration of the matters specified therein. It is, further,

{¶ 11} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman

Lynn Slaby



M. Beth Trombold



Thomas W. Johnson

RMB/dah

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FEB 01 2017



Barcy F. McNeal
Secretary

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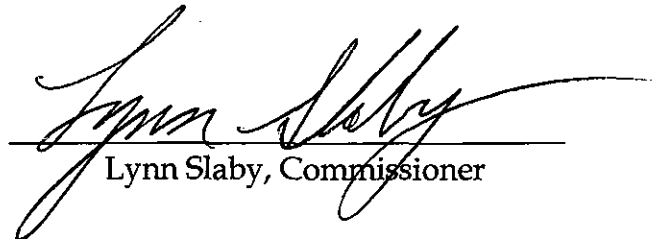
CONCURRING OPINION IN PART AND DISSENTING OPINION IN PART
OF COMMISSIONER LYNN SLABY

Entered in the Journal on February 1, 2017

{¶ 1} I concur that we have the statutory authority to grant or deny rehearing on matters we have jurisdiction over.

{¶ 2} I dissent on the basis of my original dissent in this matter.

{¶ 3} I did not believe we had statutory jurisdiction at that time. If we did not have jurisdiction then, we do not have jurisdiction to grant a rehearing now.



Lynn Slaby, Commissioner

LS/sc

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Barcy F. McNeal
Secretary