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

SECOND ENTRY ON REHEARING

Entered in the Journal on June 21, 2017

I. SUMMARY

{¶ 1} Upon consideration of comments received on rehearing, the Commission adopts a zero percentage threshold for the Relative Price Test established in the December 7, 2016 Order. Should a Reseller sell a particular utility service to a submetered residential customer and charge an amount that is greater than what the submetered residential customer would have been charged through the local public utility's default service tariffs, a rebuttable presumption will exist that the Reseller is acting as a public utility under the third prong of the *Shroyer Test*. A Reseller may overcome the rebuttable presumption if it can prove that it falls within a Safe Harbor established through this Entry on Rehearing. Further, the Commission clarifies that the rebuttable presumption, Relative Price Test, and Safe Harbor will only apply to submetered residential customers.

II. PROCEDURAL HISTORY

{¶ 2} On April 10, 2015, Mark A. Whitt filed a complaint against Nationwide Energy Partners, LLC (NEP) for alleged unfair and unjust billing practices in Case No. 15-697-EL-CSS (Whitt Complaint Case). According to the pleadings in that case, Mr. Whitt asserts that NEP supplies electric, water, and sewer services to Mr. Whitt's residential condominium located in Columbus, Ohio, within the service territory of Ohio Power Company, d/b/a AEP Ohio (AEP Ohio). The complaint states that NEP issues bills on a monthly basis for such electric, water, and sewer service, but that the rates charged by NEP for such services have not been reviewed or approved by the Commission as required by R.C. 4905.22, 4905.30, 4905.32, and 4909.18. Additionally, Mr. Whitt's complaint asserts that NEP does not possess certificates of public convenience and necessity for water or sewer service as required by R.C. 4933.25, does not have a

certified territory under R.C. 4933.83(A), is not a certified supplier of competitive retail electric service under R.C. 4928.08(B), and is not otherwise listed as a public utility pursuant to R.C. Title 49.

{¶ 3} On November 18, 2015, the Commission issued an Entry in the Whitt Complaint Case denying the motions of the Ohio Consumers' Counsel (OCC), the Ohio Partners for Affordable Energy (OPAE), and the Industrial Energy Users - Ohio (IEU-Ohio) to intervene in that case because OCC, OPAE, and IEU-Ohio were unable to demonstrate a direct interest in the outcome of the complaint case. However, we directed that their concerns be addressed within a Commission-ordered investigation in Case No. 15-1594-AU-COI (COI Case) to provide all stakeholders with an opportunity to comment on the underlying legal questions regarding submetering practices in the state of Ohio, and specifically whether third-party agents or contractors such as NEP are operating as public utilities within the Commission's jurisdiction. On December 16, 2015, the Commission issued an Entry in the COI Case to solicit comments from all stakeholders regarding the proper regulatory framework to be applied to submetering practices with respect to condominium associations in the state of Ohio.

{¶ 4} On December 7, 2016, the Commission issued a Finding and Order in the instant case (December 7, 2016 Order), regarding the test the Commission has developed to determine whether an entity is unlawfully operating as a public utility, established in *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) 1992 WL 937210 (*Shroyer Test*). The December 7, 2016 Order stated that the Commission will apply the *Shroyer Test* on a case-by-case basis to condominium associations, submetering companies, and other similarly situated entities engaged in the resale or redistribution of public utility services (collectively, Resellers), but with the clarification that an affirmative answer to any one of the three prongs of the *Shroyer Test* may be sufficient to demonstrate that an entity is operating as a public utility subject to the Commission's jurisdiction. Further, the December 7, 2016 Order sought comments on a reasonable threshold percentage above the total bill charges for a similarly-situated

customer served under the local public utility's tariff, including standard service offer generation rates for electric service (Relative Price Test), which would trigger a rebuttable presumption that the provision of a utility service is not ancillary to the Reseller's primary business, and that the Reseller would be deemed to be providing public utility service subject to the Commission's jurisdiction under the *Shroyer Test*. The December 7, 2016 Order directed that interested stakeholders file comments regarding a reasonable threshold percentage for the Relative Price Test by January 13, 2017, and reply comments by February 3, 2017.

{¶ 5} On January 6, 2017, applications for rehearing were filed by IEU-Ohio jointly with the Ohio Hospital Association and Ohio Manufacturers' Association (collectively, Industrial Advocates); One Energy Enterprises LLC (One Energy); jointly by AEP Ohio, Duke Energy Ohio, Inc. (Duke), and the FirstEnergy operating companies, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, EDUs); the Building Owners and Managers Associations of Cleveland and Ohio (BOMA); NEP; the OCC jointly with the Ohio Poverty Law Center (OCC&PLC); and Mr. Whitt. Memoranda contra were filed by the Industrial Advocates, OPAE, BOMA, FirstEnergy, NEP, and OCC&PLC.

{¶ 6} On February 1, 2017, the Commission granted rehearing for the limited purpose of considering the matters specified in the various applications for rehearing.

{¶ 7} With respect to the rebuttable presumption and Relative Price Test created in the December 7, 2016 Order, comments and/or replies were filed jointly by AEP Ohio & Duke, and separately by Dayton Power and Light Company (DP&L); jointly by OCC&PLC with the Coalition on Homelessness and Housing in Ohio, the Legal Aid Society of Southwest Ohio, LLC, and the Edgemont Neighborhood Coalition (collectively, the Residential Advocates); the Industrial Advocates; Direct Energy Business, LLC and Direct Energy Services, LLC (Direct Energy); and separately by Guardian Water & Power, Inc. (Guardian), BOMA, American Power and Light, LLC

(AP&L), the Utility Management and Conservation Association (UMCA), NEP, and Mr. Whitt.

{¶ 8} The Commission will first address the seven pending applications for rehearing before considering the comments filed regarding a reasonable threshold percentage for the Relative Price Test.

III. APPLICATIONS FOR REHEARING

{¶ 9} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for 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.

{¶ 10} As noted above, applications for rehearing were filed by the EDUs, the Industrial Advocates, One Energy, BOMA, NEP, Mr. Whitt, and OCC&PLC, to which memoranda contra were filed by two additional parties, OPAE and FirstEnergy. Most of the foregoing parties also commented on the rebuttable presumption proposal, as did DP&L, and AEP Ohio & Duke jointly, Direct Energy, Guardian, American, UMCA, and the Residential Advocates. The failure to expressly address every point raised does not mean it was not considered by the Commission in reaching its conclusions below, and any assignments of error not specifically addressed by the Commission are hereby denied.

{¶ 11} With respect to each application for rehearing, we first note that the issues to be considered in this COI Case are limited to the factual scenario where an entity resells submetered electric, natural gas, water, or sewer service from a public utility to end-use consumers. We clarify that the modifications to the *Shroyer Test* discussed in the December 7, 2016 Order apply where there is an actual physical submeter behind a master meter. The Commission will not apply the modifications to the *Shroyer Test* to municipal utilities or rural cooperatives at this time as they are not public utilities under

R.C. 4905.02(A), and we will defer to municipal utilities and rural cooperatives to determine if the resale of their services should be restricted or prohibited. However, we also note that the basic *Shroyer Test* continues to apply to the resale of such services.

A. Advisory Opinions

{¶ 12} As his first ground for rehearing, Mr. Whitt contends that the December 7, 2016 Order represents an advisory opinion, which the Commission is without jurisdiction or authority to issue. He asserts that such advisory opinions are especially prejudicial and inappropriate when actual cases are pending before the Commission that involve the same or similar issues, and that the *Shroyer Test* was developed under very different facts than those in his complaint which resulted in this COI Case.

{¶ 13} Mr. Whitt cites *White Consol. Industries v. Nichols*, 15 Ohio St.3d 7, 9, 471 N.E.2d 1375, 15 OBR 6 (1984) for the proposition that 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. However, we do not find the *White Consol. Industries* decision to be controlling here. In that case, the appellant had challenged a series of administrative rules adopted by the Ohio Environmental Protection Agency as being unreasonable and unlawful, but the Court dismissed the appeal because there were no facts against which to test the rules, and without such facts, the appeal did not present a justiciable controversy. *Id.* at 15 Ohio St.3d 8-9. Unlike that case, the COI Case under consideration here is authorized under R.C. 4905.26, and has not resulted in the promulgation of any rules.

{¶ 14} Furthermore, we initiated this proceeding to receive input from all industry stakeholders and to determine if any modifications to the *Shroyer Test* were necessary in light of changes in the industry since the *Shroyer Test* was first established. We do not agree that the December 7, 2016 Order is an improper advisory opinion. Rather, our investigation in this COI Case allowed a forum for stakeholder input and an opportunity to consider modifications to the *Shroyer Test* before we consider the evidence to be

proffered in the Whitt Complaint Case. Moreover, as noted above, the Commission is well within its jurisdiction to conduct investigations under R.C. 4905.26. Accordingly, rehearing on this assignment of error should be denied.

B. Regulatory Framework and Consumer Protections for Submetered Residential Arrangements

{¶ 15} As his second ground for rehearing, Mr. Whitt contends that this Commission lacks jurisdiction or authority to apply a "regulatory framework" that fails to fully consider the statutory public utility definitions, and he asserts that the Commission must at least revise such framework to comply with Ohio law. He criticizes the December 7, 2016 Order for failing to address the statutory definitions of "public utility" under R.C. 4905.02 and 4905.03, and relying solely on the *Shroyer Test* for determining whether an entity is a public utility. He asserts that the *Shroyer Test* was developed under very different facts than those giving rise to this investigation, and contends that the Commission should determine the facts of what it is investigating before establishing a policy.

{¶ 16} Mr. Whitt opines that the basic flaw with the *Shroyer Test* is the focus on common law factors of what makes an enterprise a "public utility," without considering how these factors relate to the statutory definitions. He cites *Haning v. Pub. Util. Comm.*, 86 Ohio St.3d 121, 128; 1999-Ohio-90, 712 N.E.2d 707, where the Court upheld the Commission's dismissal of several consolidated complaints against liquid propane (LP) suppliers on the grounds that an LP supplier was not a gas company or natural gas company as defined in R.C. 4905.03. He also contends that the Court in *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 466; 2006-Ohio-2989, 849 N.E.2d 14, did not affirm the *Shroyer Test* as a one-size-fits-all approach to determining whether an entity is a public utility, and that the three prongs of the *Shroyer Test* are not the exclusive means of establishing that an entity is a public utility. He argues that there is no statutory requirement that a complainant show that a respondent is "primarily" engaged in the business of a public utility as a condition for a finding that the respondent is engaged in

the business of supplying public utility service. He also cites examples where the Court has affirmed the Commission's findings that companies were determined to be public utilities, notwithstanding that the companies did not seek any special benefits available to public utilities, or to serve the public generally. See, *Industrial Gas Corp. v. Pub. Util. Comm.*, 135 Ohio St. 408, 21 N.E.2d 166, syllabus ¶1 (1939); and *Atwood Resources, Inc. v. Pub. Util. Comm.*, 43 Ohio St. 3d 96, 538 N.E.2d 1049, 104 P.U.R.4th 529 (1989).

{¶ 17} In their first assignment of error, the Residential Advocates argue that the Reseller in a submetered residential condominium arrangement is, in fact, operating as a public utility; and they assert that the condominium owners should be afforded the same consumer protections as residential customers under Ohio law and the Commission's rules. They allege that, in submetered residential condominium arrangements, the Reseller possesses the attributes commonly associated with public utilities in that the Reseller furnishes an essential good or service to the general public which has a legal right to demand or receive this good or service, and that the Reseller conducts its operations in such a manner as to be a matter of public concern. They allege that the resale of public utility services to residential consumers is the Reseller's primary business, that such service is available to the general public, and that the Reseller is availing itself of special benefits of public utilities in violation of the Commission's exclusive jurisdiction to regulate public utilities and the certified territory provisions of R.C. 4933.83.

{¶ 18} In their third and sixth assignments of error, the Residential Advocates also contend that the Commission erred by not requiring Ohio's EDUs to adopt tariffs that prevent abuses of residential consumers arising from submetering arrangements, and in failing to protect the public interest by implementing consumer protections for residential consumers, which would include proper disconnection procedures, and disclosures of pricing, terms, and conditions prior to the establishment of service. They also request a moratorium on the establishment of new residential submetering arrangements to prevent future abusive submetering practices.

{¶ 19} Rehearing on these assignments of error should be denied. Under R.C. 4905.02, the definition of a "public utility" includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, that is engaged in the business of providing the services listed in R.C. 4905.03 (such as an electric light company); but R.C. 4905.02(A) expressly excludes any electric light company that operates its utility not for profit, such as a rural cooperative or municipal electric light company. The *Shroyer Test* is rooted in this statutory authority, and the Ohio Supreme Court has expressly recognized this Commission's authority to determine whether an entity is a public utility. *Atwood Resources*, 43 Ohio St. 3d 96, 98. Further, the Court has recognized that long-standing administrative interpretations are entitled to special weight, but also that the Commission must, when appropriate, be willing to change its policies. See, *Luntz*, 79 Ohio St.3d 509, 512-13, citing *Cleveland v. Pub. Util. Comm.*, 67 Ohio St.2d 446, 451, 21 O.O. 3d 279, 282, 424 N.E.2d 561, 565 (1981); and *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 51; 10 OBR 312, 313; 461 N.E.2d 303, 304-305 (1984).

{¶ 20} In this COI Case, after soliciting input from stakeholders, we are applying our long-standing administrative interpretations of R.C. 4905.02 and 4905.03, but we will modify the *Shroyer Test* in this proceeding as necessary to protect Ohio residents in submetered arrangements, on a case-by-case basis.

{¶ 21} With respect to Mr. Whitt's arguments, we agree that the fundamental question of whether any specific company is operating as a public utility must be determined upon the facts of each case. *Industrial Gas*, 135 Ohio St. 408, 413, at syllabus ¶1. The December 7, 2016 Order expressly stated that the "Commission will extend the *Shroyer Test,* on a case-by-case basis to determine whether a landlord, condominium association, submetering company, or any other similarly-situated entity is operating as a public utility." December 7, 2016 Order at 9. In *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 596 N.E.2d 423 (1992), the Ohio Supreme Court reviewed the case law and noted that "the meaning of 'public utility,' although

sometimes elusive, has gradually evolved through case law" and that the determination of whether a particular entity is a public utility is a mixed question of law and fact, citing *Marano v. Gibbs* (1989), 45 Ohio St.3d 310, 311, 544 N.E.2d 635. Further, the resolution of the question of whether an enterprise is operating as a public utility is decided by an examination of the nature of the business in which it is engaged. *Indus. Gas Co. v. Pub. Util. Comm.* (1939), 135 Ohio St. 408, 14 O.O. 290, 21 N.E.2d 166, paragraph one of the syllabus. And although case law provides a list of characteristics common to public utilities, none of these characteristics is controlling and each case must be decided on the facts and circumstances peculiar to it. *Indus. Gas Co. v. Pub. Util. Comm., supra,* at 413. *Montville Bd. of Twp. Trustees v. WDBN, Inc.* (1983), 10 Ohio App.3d 284, 10 OBR 400, 461 N.E.2d 1345.

{¶ 22} In reviewing the case law and arguments of the parties, we find nothing to suggest that our use of the *Shroyer Test,* on a case-by-case basis, should be abandoned. We conclude that the *Shroyer Test,* as clarified herein, continues to provide an appropriate test to use in making case-by-case determinations.

{¶ 23} With respect to the Residential Advocates request for a prohibition or moratorium on the resale of public utility services, the case law demonstrates that a prohibition of the resale of public utility service is not an option in this proceeding. The Supreme Court has held that an electric utility cannot prohibit the resale of electric service by a landlord to a tenant if the resale took place only on the landlord's property. See, *In re FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, where the Court upheld this Commission's decision in *In re Brooks v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS, (May 8, 1996), which followed *Shopping Centers Assn. v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 32 O.O.2d 1, 208 N.E.2d 923 (1965).

{¶ 24} Finally, we cannot agree with the Residential Advocates that there is any particular Reseller under consideration in this investigation. All factual questions about NEP and its relationship with Mr. Whitt must be addressed in the pending Whitt

Complaint Case. Any jurisdictional consumer protections can only apply after a case-by-case determination that a particular Reseller is operating as a public utility. Accordingly, rehearing on these assignments of error should be denied.

C. Rule-Making and the JCARR Approval Process.

{¶ 25} R.C. 111.15 generally requires that Commission rules be filed for approval with the Joint Committee on Agency Rule Review (JCARR), the Secretary of State, and the Legislative Service Commission. In BOMA's fourth assignment of error, and the Industrial Advocates' third assignment of error, they argue that the December 7, 2016 Order adopted rules within the meaning of R.C. 111.15, while failing to comply with the JCARR approval process. BOMA notes that R.C. 111.15(A)(1) defines a "rule" as "any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency" and that a rule has "general and uniform operation" for purposes of R.C. 111.15(A)(1) if it is uniformly applied by the promulgating agency to those affected by the rule. *B & T Express, Inc. v. Pub. Util. Comm.*, 145 Ohio App.3d 656, 665, 763 N.E.2d 1241 (10th Dist. 2001), citing *Ohio Ass'n. of Cty. Bds. of Mental Retardation & Developmental Disabilities v. Pub. Employees Retirement System*, 61 Ohio Misc. 2d 836, 842, 585 N.E.2d 597 (C.P. 1990).

{¶ 26} Rehearing on these grounds should be denied. The *Shroyer Test* has never been incorporated within the Commission's rules. Rather, it was developed as a tool for interpreting the applicable provisions of R.C. 4905.02 and 4905.03, on a case-by-case basis, in response to complaints or requests brought before the Commission. Further, the use of the *Shroyer Test* in determining the Commission's jurisdiction has been expressly upheld by the Supreme Court of Ohio. *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, at ¶ 17, 849 N.E.2d 14.

D. Commercial, Industrial, and Distributed Generation Arrangements

{¶ 27} In their respective third and fourth assignments of error, BOMA and the Residential Advocates urge the Commission to clarify that its proposals in this

proceeding would not extend to any assertion of jurisdiction over commercial and industrial resale arrangements. They concede that the Commission should not be restricted to its review of utility distribution service, but they note that the review in this proceeding was spurred by complaints regarding submetered arrangements within the context of residential condominium communities. They contend that our review in this proceeding should be limited to submetered residential customers. One Energy, in its first assignment of error, requests that the Commission clarify that the December 7, 2016 Order does not apply to behind-the-meter distributed generation.

{¶ 28} As the December 7, 2016 Order did not expressly restrict the adoption of a Relative Price Test to submetered residential service, we will grant rehearing on this assignment of error in order to clarify that our creation of the Relative Price Test, as well as our adoption of a Safe Harbor discussed below, will not apply to arrangements between commercial or industrial parties, although the basic *Shroyer Test* will still apply to commercial and industrial arrangements on a case-by-case basis. Further, we will clarify that the December 7, 2016 Order does not extend to behind-the-meter distributed generation. Distributed generation was not the subject of this investigation, and we make no findings regarding distributed generation in this COI Case.

E. Statutory Interpretations and Precedent

{¶ 29} In its first four assignments of error, NEP asserts that the December 7, 2016 Order unlawfully and unreasonably fails to consider the governing statutes, as interpreted by the Court, and ignores precedent in determining the scope of the Commission's jurisdiction over submetering, and the rates charged for the resale of utility service. The Industrial Advocates in their first assignment of error, and One Energy in its second assignment of error, join NEP in asserting that the December 7, 2016 Order fails to follow precedent in determining the scope of the Commission's jurisdiction over submetering.

{¶ 30} These parties argue that the Commission is unlawfully and unreasonably subjecting Resellers to the *Shroyer Test* in as much as only the public utility's customer can resell or redistribute public utility service. NEP asserts that the General Assembly has not granted express authority to the Commission to regulate the reselling of utility services, but admits that under Supreme Court's holding in *Pledger*, 109 Ohio St.3d 463, 466, the statutory definitions of public utility in R.C. 4905.03 are not self-applying in the context of the landlord-tenant relationship. NEP contends that the Court has supplied the necessary interpretation of these statutes in the context of landlord submetering arrangements, in that the landlord is not in the business of supplying such utility services, but is itself the consumer of such services supplied by the jurisdictional utility.

{¶ 31} Rehearing on these assignments of error should be denied. As noted above, the statutory definitions in R.C. 4905.02 and 4905.03 are not self-applying to the landlord-tenant relationship. *Pledger*, 109 Ohio St.3d 463, 466. Therefore, the Commission must weigh the facts and circumstances of each case, and our consideration of whether any individual Reseller is a public utility must be made after the development of an evidentiary record in a complaint case.

F. Modification of the Shroyer Test.

{¶ 32} In their respective first and second assignments of error, the Industrial Advocates and BOMA argue that the December 7, 2016 Order unlawfully modifies the *Shroyer Test* in holding that an affirmative answer to any one of the three prongs of the test would result in a finding that the Commission has jurisdiction over the Reseller's operations. They cite *A & B Refuse Disposers*, 64 Ohio St.3d 385, and *Pledger*, 109 Ohio St.3d 463, 466, in contending that this modification would violate established precedent since any determination of whether an entity is a public utility is a mixed question of law and fact. In its second assignment of error, BOMA contends that the December 7, 2016 Order unreasonably expands the Commission's jurisdiction over landlord/tenant relationships and will result in the Commission second-guessing the terms of existing lease agreements.

{¶ 33} Rehearing on these assignments of error should be denied. The December 7, 2016 Order clarified that in applying the *Shroyer Test,* an affirmative answer to any one of the three prongs is sufficient to demonstrate that an entity is operating as a public utility, and is consistent with *A & B Refuse Disposers*, 64 Ohio St.3d 385 and *Pledger*, 109 Ohio St.3d 463, 466. To put it another way, an affirmative answer to each prong of the *Shroyer Test* is not necessary to establish jurisdiction over the Reseller; rather the Commission will weigh the facts and circumstances of each case. While our determination of jurisdiction over a particular service arrangement must be considered on a case-by-case basis, we believe that our refinement of the *Shroyer Test*, as discussed below, can be helpful in establishing parameters for Resellers to determine whether their operations will be considered jurisdictional by this Commission.

G. Rebuttable Presumption and Relative Price Test

{¶ 34} In their respective second, fifth, and first assignments of error, BOMA, NEP, and the Industrial Advocates contend that the December 7, 2016 Order unlawfully and unreasonably modified the third prong of the *Shroyer Test* to include the consideration of charges that would, at some level, create a rebuttable presumption that a Reseller is a public utility subject to the Commission's jurisdiction. In their second assignment of error, the Residential Advocates argue that such a rebuttable presumption would place an undue burden of proof on a resident in a complaint case.

{¶ 35} In their respective fifth assignments of error, NEP and the Residential Advocates criticize the rebuttable presumption threshold proposed in the December 7, 2016 Order if such threshold is to be based upon the total bill charges for a similarly situated customer served under the local public utility's default service tariff, because the Reseller will likely not have the same distribution costs.

{¶ 36} In their application for rehearing, the EDUs urge the Commission to retain jurisdiction over submetering issues and provide for an appropriate transition process to convert existing submetered premises to EDU service. They also suggest that the

Commission adopt a revised test that would apply a rebuttable presumption if a Reseller charges more than what the Reseller pays for master meter service. The EDUs criticize the proposed use of "a similarly situated customer" as being too ambiguous in failing to specify whether the Reseller's charges would be compared to those paid by a residential customer served under a residential tariff, or with a "similarly situated" landlord customer being served under the building's master-metered tariffed service. They also question whether an electric utility's standard service offer (SSO) refers only to the SSO generation rate, or the fully bundled SSO tariff, including generation and wires charges. Moreover, the EDUs complain that the Commission's rebuttable presumption would still allow Resellers to make a substantial profit while avoiding regulation as a public utility. They contend that consumers are harmed when Resellers buy master meter service at typically higher voltage and at lower rates than the residential tariff, but charge each individual tenant under a higher rate.

{¶ 37} In its second assignment of error, the Industrial Advocates assert that there is no logical or factual nexus for finding that a Reseller is a public utility if the Reseller's price exceeds a regulated price because standard service prices are not comparable to shopped prices, and will not provide a usable test for determining whether the service provided is ancillary.

{¶ 38} NEP's sixth assignment of error suggests that the Commission require residents to provide sufficient information that would allow the threshold jurisdictional issue to be addressed prior to a hearing on the merits of any submetering complaint.

{¶ 39} Except for NEP's sixth assignment of error, rehearing on these assignments of error should be denied. The Commission first notes that the December 7, 2016 Order did not change the complainant's burden of proof in complaint cases. Although not strictly binding upon the Commission, we note that the Ohio Rules of Evidence clearly state that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but *does not shift to such*

party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast." Evid.R. 301 (emphasis added).

{¶ 40} We also note the numerous objections to the December 7, 2016 Order's creation of the rebuttable presumption. With respect to NEP's request that the threshold jurisdictional issues be determined prior to the hearing, we affirm our decision to establish a rebuttable presumption. However, we will grant rehearing to create a "Safe Harbor" for a Reseller once the rebuttable presumption is triggered under the third prong of the *Shroyer Test.* A Reseller will overcome the rebuttable presumption and thus will not be subject to Commission jurisdiction under the third prong of the *Shroyer Test* if the Reseller demonstrates that (1) the Reseller is simply passing through its annual costs of providing a utility service charged by a local public utility and competitive retail service provider (if applicable) to its submetered residents at a given premises; or (2) the Reseller's annual charges for a utility service to an individual submetered resident do not exceed what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs. Again, the Relative Price Test and Safe Harbor will apply only to submetered residential customers.

{¶ 41} In order to facilitate an orderly and expedient resolution of any potential complaints, the electric, gas, water and sewer distribution utilities are directed to work with Staff to develop a website tool or other mechanism to provide submetered residential customers with an estimated calculation of the what the customer would have paid the local public utility for equivalent usage, on a monthly total bill basis, under the utility's default service tariffs.

IV. THRESHOLD PERCENTAGE FOR THE RELATIVE PRICE TEST

{¶ 42} As noted above, comments and reply comments regarding the rebuttable presumption and Relative Price Test created in the December 7, 2016 Order, were filed by the EDUs, Residential Advocates, the Industrial Advocates, Direct Energy, Guardian,

BOMA, AP&L, UMCA, NEP, and Mr. Whitt. None of these parties advocate for the adoption of a particular percentage above the total bill charges for similar usage under the local distribution utility's default service that would be allowed for a Reseller to collect in determining whether such resale is lawful.

{¶ 43} In his comments, Mr. Whitt argues that any rate charged for a public utility service must be subject to this Commission's jurisdiction, regardless if such service is ancillary to the Reseller's primary business.

{¶ 44} NEP's comments repeat its assertions that the Commission does not have jurisdiction over submetering but they state that, to the extent the Commission adopts a percentage threshold as part of the *Shroyer Test*, it should adopt a zero percent threshold based on a comparison 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. Further, NEP argues that the rebuttable presumption should exclude the resale of municipal services, and only apply to situations where the Commission has jurisdiction over the public utility providing service to the consumer's master meter. AP&L joins NEP in arguing that the threshold percentage should apply only to the charges for the submetered utility service measured at the tenant's, lessee's, or condominium unit owner's submeter, and should not include charges for common areas, meter reading and billing services, or condominium association dues.

{¶ 45} The EDUs maintain that all submetering, including commercial and industrial arrangements, should be prohibited to the greatest extent possible, and they take issue with NEP's suggestion that the rate be set to zero percent above the utility's standard offer rate. The EDUs advocate a "no markup" approach under which a submetering entity would be deemed to be a "public utility" whenever it charges an end-use customer more than what the landlord or submetering entity pays for the utility service it is reselling to the end-user. The Residential Advocates echo the EDUs' suggestion that the threshold should be set at the rate the residential customer of the local

public utility would pay for generation, transmission, and distribution for the same usage, excluding any riders not charged to the Reseller. They note that in *Pledger v. Capital Property Management, Ltd.*, Case No. 04-1059-WW-CSS, the Respondent's Answer filed July 13, 2004, admitted that the landlord charged a ten percent administrative fee, which the Residential Advocates contend is too high.

{¶ 46} In their comments, Direct Energy raises concerns that the regulation of Resellers as public utilities using a comparison of retail end-user prices to utility rates will constrain Ohio's electric retail supply market as the distribution utility's residential rates are not comparable to the actual costs of serving a large building, and would hamstring the ability of retail suppliers to develop market-based pricing and/or customer-specific pricing tailored to the specific needs of the commercial customer. Direct Energy suggests that, rather than limiting the amounts that can be charged to end-users in a submetering situation based on rates unrelated to the Reseller's costs, the Commission should establish disclosure requirements for submetering similar to retail supplier disclosure rules. They contend that Resellers should be required to disclose the pricing, terms, and conditions of their services, including the price per kWh and formula used to determine usage amounts with a 12-month historical usage profile for the unit, that would allow a customer to properly assess these costs prior to the provision of service.

{¶ 47} The Industrial Advocates repeat their contention that the creation of a rebuttable presumption using a Relative Price Test is not based on a rational nexus between the proven facts and the presumed facts. They note comparison issues regarding standard service offers that are subject to change, versus shopped supplier rates, as well as the potential complications in considering bundled services, in concluding that there is no reasoned basis for establishing a percentage threshold.

{¶ 48} In their comments, Guardian states that in many cases tenants will be charged less with a submetered bill then they would be as a stand-alone customer of the

utility. Guardian asks the Commission to declare that a submetering company, which allocates and bills tenants for consumption at actual cost plus a competitively derived administrative fee, is not a public utility. BOMA repeats its contention that any threshold percentage should not apply to commercial landlords, but that if such threshold is applied, it should be higher for commercial landlords to reflect the costs these landlords incur to operate and maintain their internal utility systems.

{¶ 49} After reviewing the comments and replies, we first note that this investigation only extends to the resale of public utility services to submetered residential customers and not the resale of non-profit cooperative or municipal services. In addition, as discussed above, our adoption of the rebuttable presumption, Relative Price Test, and Safe Harbor excludes commercial or industrial arrangements, as well as behind-the-meter distributed generation. Further, any Commission disclosure requirements for submetering, as suggested by Direct Energy, would only become effective after a finding that the Reseller is a public utility. With respect to the specific threshold percentage, we will accept the recommendations of both the Residential Advocates and NEP, in setting the threshold percentage of the Relative Price Test at zero. In calculating the Reseller's charges under the Relative Price Test, a submetered residential customer should include any administrative fees or similar charges, but should exclude any charges for common areas. For common areas, the Commission will not assert jurisdiction over a Reseller where a Reseller is simply passing through its costs of providing a utility service charged by a local public utility and competitive retail service provider (if applicable) to its submetered residents at a given premises. Thus, in any given case, the rebuttable presumption will be invoked where the Reseller charges the submetered residential customer more than the customer would have paid the local public utility under the default service tariff for the equivalent usage on a total bill basis.

{¶ 50} To summarize, a submetered residential customer can trigger the rebuttable presumption through use of the Relative Price Test. Specifically, a submetered residential customer can take his/her bill and compare the Reseller's utility service charge against

what the customer would have paid the local public utility. If the submetered customer is paying the Reseller more than what he/she would have paid the local public utility, then the rebuttable presumption is triggered, and the Reseller is presumed to be a public utility under the third prong of the *Shroyer Test.* This would invoke Commission jurisdiction over the Reseller. The Reseller, however, will avoid Commission jurisdiction under the third prong of the *Shroyer Test* if it can prove that it falls within one of the Safe Harbor provisions described above.

V. ORDER

{¶ 51} It is, therefore,

{¶ 52} ORDERED, That the applications for rehearing be granted to the extent set forth above, but denied in all other respects. It is, further,

{¶ 53} ORDERED, That the electric, natural gas, water, and sewer distribution utilities work with Staff to develop a website tool that will provide submetered residential consumers with an estimated calculation of the total bill costs for a residential customer with equivalent usage under the local public utility's default service tariff. It is, further,

{¶ 54} ORDERED, That a copy of this Entry on Rehearing be served upon all electric, natural gas, water, and sewer distribution companies, and all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

RMB/dah

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Barcy F. McNeal
Secretary