

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation of Submetering in the State)	Case No. 15-1594-AU-COI
of Ohio.)	

**APPLICATION FOR REHEARING
OF
AMERICAN POWER AND LIGHT, LLC**

Pursuant to Ohio Revised Code Section 4903.10 and Ohio Administrative Code Rule 4901-1-35, American Power and Light, LLC (“AP&L”) respectfully submits this Application for Rehearing of the Second Entry on Rehearing issued by the Public Utilities Commission of Ohio (“Commission”) on June 21, 2017. The Commission’s June 21, 2017 Second Entry on Rehearing is unreasonable and unlawful in the following respect: the second safe harbor provided in ¶ 40 of the Second Entry on Rehearing should have included an allowable percent exceedance of at least five percent to account for any minor differences between the residential consumer’s actual charges and the utility’s charges over the 12-month period. The facts and arguments supporting this Application for Rehearing are set forth in the attached memorandum in support. AP&L respectfully requests that the Commission grant rehearing and modify its June 21, 2017 Second Entry on Rehearing accordingly.

Respectfully submitted,

/s/ Michael J. Settineri

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**MEMORANDUM IN SUPPORT OF
THE APPLICATION FOR REHEARING OF
AMERICAN POWER AND LIGHT, LLC**

I. INTRODUCTION

Through this rehearing application, American Power and Light, LLC (“AP&L”) asks this Commission to modify its second safe harbor to the rebuttable presumption created under the Relative Price Test by allowing for a percent threshold when making the comparison between the Reseller’s annual charges and what a residential consumer would pay if on default utility rates.¹ A percent threshold is warranted for the annualized safe harbor for a number of reasons. These include the practical recognition that variations can, and often do, occur in utility rates throughout a year. A percent threshold will also avoid the situation where a minor exceedance over default utility rates during a 12-month period triggers the Commission’s jurisdiction. Thus, as proposed herein, while the monthly snapshot of the Relative Price Test will remain at a zero-percent threshold, the annualized safe harbor will allow for a reasonable percent exceedance to account for slight differences between actual charges and utility rates that may take place throughout the year. AP&L recommends that the Commission adopt five-percent as a reasonable percent threshold.

II. BACKGROUND

In its June 21 Second Entry on Rehearing, the Commission set a zero-percent threshold for the Relative Price Test² and for the first time adopted two safe harbors to the rebuttable

¹ By filing this application for rehearing, AP&L does not waive any argument previously raised in this proceeding including arguments related to the Commission’s jurisdiction over submetering or the adoption of the Relative Price Test and corresponding rebuttable presumption.

² Second Entry on Rehearing at ¶49.

presumption that can be created by the Relative Price Test³ under the third prong of the *Shroyer Test*.

When describing the Relative Price Test, the Commission stated:⁴

[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*.

The Commission, recognizing the need for a threshold jurisdictional test, stated that 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:⁵

(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.

The Relative Price Test provides a monthly snapshot comparison while the second safe harbor provides a comparison on an annual basis. It is the second safe harbor comparison should have a percent exceedance threshold to account for minor variations that may occur over the 12-month period.

III. ARGUMENT

A. It was unjust and unreasonable for the Commission to not adopt a percent threshold for the annual charges safe harbor

It is important to note that local public utility default rates are not static. As this Commission is aware, rates vary regularly based on base rate adjustments, rider adjustments,

³ Second Entry on Rehearing at ¶ 40.

⁴ Second Entry on Rehearing at ¶ 50.

⁵ *Id.* at ¶ 40.

credits/refunds, and other reasons. As such, the zero-percent threshold of the Relative Price Test will require Resellers to constantly readjust pricing to avoid any claim that actual charges exceed local public utility charges.

It is possible though that a Reseller exercising reasonable diligence will not capture every change in utility rates (up or down). For example, there may be instances where utility rates change in the month of the Relative Price Test comparison. Under that circumstance, the consumer would be drawing a comparison using an invoice received for the prior month's usage but referencing an updated bill calculator on the local public utility's website. Local public utility rates are also subject to annual reconciliations and in some instances one-time credits or on-going credits. These monthly differences, if not captured, could easily lead to a minor exceedance when comparing annualized actual charges to the charges that would have been incurred under the local public utility rates to determine if the second safe harbor applies to the Reseller.

To account for any minor differences that may aggregate over the 12-month period of the second safe harbor, AP&L requests that the Commission modify the second safe harbor by allowing for at least a five-percent threshold. Thus, a Reseller would qualify for the second safe harbor if the Reseller's annual charges for a utility service to an individual submetered resident do not exceed five percent of 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.

Incorporating a percent threshold into the annualized safe harbor provides a reasonable balance to the strict zero-percent threshold of the Relative Price Test. Consumers will be able to create the rebuttable presumption through the monthly snapshot of the Relative Price Test even if

the difference is a result of a minor variation between actual charges and local public utility charges. Resellers, though, would be able to rely on the safe harbor with its percent exceedance threshold to account for any minor differences that accrued over the 12-month comparison period for that safe harbor.

As an example, if the Relative Price Test was triggered in January 2018 and the difference between actual charges and public local utility charges on an annual basis was \$5, a Reseller could be a jurisdictional public utility under the third prong of the *Shroyer Test* because the Reseller would not qualify for the second safe harbor. In other words, \$5 is the difference between the Reseller being a public utility and not being a public utility. However, if for example, the actual charge amount over 12 months was \$800, a five-percent threshold would result in an allowable exceedance of \$40 for the 12-month period. Under that example, the Reseller would not be a jurisdictional utility under the third prong of the *Shroyer Test* because the difference of \$5 would be less than the allowable exceedance of \$40.

As the examples indicate, applying a percent exceedance threshold to the second safe harbor in the Commission's Second Entry on Rehearing provides a practical and reasonable balance to the strict application of the Relative Price Test and its corresponding zero-percent threshold.

IV. CONCLUSION

For the forgoing reasons, AP&L respectfully requests that the Commission grant rehearing to adopt a five-percent threshold as part of the annualized charge safe harbor. AP&L

is recommending a five-percent threshold as a reasonable threshold, and urges the Commission to grant rehearing on this point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served (via electronic mail) on the 21st day of July 2017 upon the persons listed below.

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Summary: App for Rehearing to Second Entry on Rehearing electronically filed by Mr. Michael J. Settineri on behalf of American Power and Light, LLC