

## 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

### THIRD ENTRY ON REHEARING

Entered in the Journal on August 16, 2017

#### I. SUMMARY

{¶ 1} The Commission grants the applications for rehearing of the June 21, 2017 Second Entry on Rehearing for the purpose of further consideration of the matters specified in the applications for rehearing.

#### II. DISCUSSION

{¶ 2} 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., Feb. 27, 1992 Opinion and Order. 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} On December 7, 2016, the Commission issued a Finding and Order (December 7, 2016 Order), which clarified that failure of 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, 2016 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} Applications for rehearing of the December 7, 2016 Order were filed by various parties which were granted for the limited purpose of allowing additional time to considering the matters specified by the first Entry on Rehearing issued on February 1, 2017.

{¶ 7} On June 21, 2017, the Commission issued a Second Entry on Rehearing (June 21, 2017 Entry), which adopted a zero percentage threshold for the Relative Price Test established in the December 7, 2016 Order, and clarified that such test would only

apply to submetered residential customers. The June 21, 2017 Entry held that if a Reseller of utility service charged a submetered residential customer more than what the customer would have been charged through the local public utility's default service tariffs, the Reseller would be presumed to be acting as a public utility under the third prong of the *Shroyer Test*. However, the June 21, 2017 Entry also created a Safe Harbor under which the Reseller may overcome this rebuttable presumption, and thus avoid Commission jurisdiction under the third prong of the *Shroyer Test*, if the Reseller can demonstrate that it is simply passing through its annual costs of providing the utility service, or the Reseller's annual charges for the utility service 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.

{¶ 8} 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.

{¶ 9} On July 21, 2017, applications for rehearing of the June 21, 2017 Entry were filed by the FirstEnergy operating companies (Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company), American Power and Light, LLC, Mark A. Whitt, the Ohio Partners for Affordable Energy (OPAE), and jointly by Ohio Power Company with Duke Energy Ohio, Inc., and the Ohio Consumers' Counsel with the Ohio Poverty Law Center.

{¶ 10} 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

{¶ 11} It is, therefore,

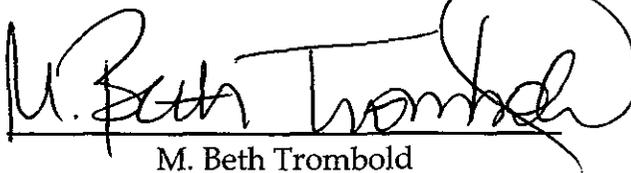
{¶ 12} ORDERED, That the applications for rehearing filed on July 21, 2017, be granted for further consideration of the matters specified therein. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



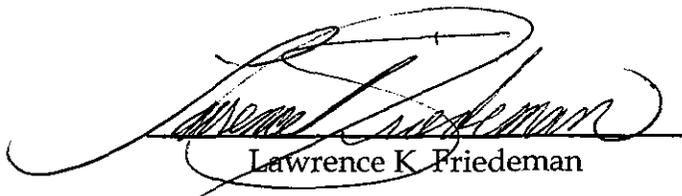
Asim Z. Haque, Chairman



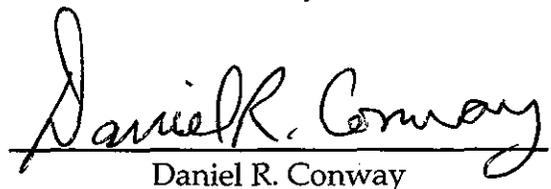
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman

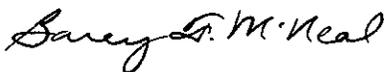


Daniel R. Conway

RMB/dah

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**AUG 16 2017**



Barcy F. McNeal  
Secretary