

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Cynthia Wingo,)	
)	
Complainant,)	
)	
v.)	Case No. 17-2002-EL-CSS
)	
Nationwide Energy Partners, LLC, et al.)	
)	
Respondent.)	

**NATIONWIDE ENERGY PARTNERS, LLC’S REPLY TO MEMORANDUM CONTRA
BY AEP OHIO AND COMPLAINANT**

I. INTRODUCTION

Through its motion to dismiss, Nationwide Energy Partners, LLC (“NEP”) presented probative evidence that it is not a public utility over which the Commission has subject matter jurisdiction under the three prongs of the *Shroyer Test*. In this reply, NEP responds to both the Memorandum Contra filed by Ms. Wingo on November 16 and the Memorandum Contra filed by Ohio Power Company (“AEP Ohio”) on November 17, 2017. Aside from conclusory statements that factual issues remain to be resolved at a hearing, Ms. Wingo and AEP Ohio do not attempt to refute any of the evidence presented by NEP, nor do they point to any specific factual questions material to the *Shroyer Test* that remain to be resolved at hearing. In fact, aside from meager references to the *Shroyer Test* in their Memoranda Contra, Ms. Wingo and AEP Ohio omit any discussion of the Commission’s test. Although Ms. Wingo and AEP Ohio attempt to sidestep it, the *Shroyer Test* is the Commission’s adopted standard by which the Commission will “determine whether a landlord, condominium association, submetering company, or any other similarly-situated entity is operating as a public utility” in connection

with submetering.¹ Contrary to both Ms. Wingo's and AEP Ohio's claims, the Commission should consider the undisputed evidence submitted by NEP, apply the *Shroyer Test*, and dismiss the Complaint against NEP.

II. ARGUMENT

A. NEP's motion to dismiss is the proper vehicle for determining the Commission's jurisdiction under the *Shroyer Test*.

Ms. Wingo begins her Memorandum Contra by incorporating her response from Case No. 16-2401-EL-CSS, where she claimed that a motion to dismiss is not the proper vehicle for resolving the question of the Commission's subject matter jurisdiction under the *Shroyer Test*.² Likewise, AEP Ohio in a separate memorandum contra also claims that NEP's motion to dismiss is not proper.³ But for all the reasons noted in NEP's Reply in that proceeding,⁴ the *Shroyer Test* is the test by which the Commission determines the question of its subject matter jurisdiction to hear a complaint concerning submetering, and a motion to dismiss is the appropriate means of resolving that question.

Ms. Wingo's and AEP Ohio's protestations notwithstanding, the Commission's authority to apply the *Shroyer Test* on a motion to dismiss is firmly rooted in the Commission's rules and the unanimous decisions of both the Commission and the Supreme Court of Ohio,⁵ all of which

¹ Second Entry on Rehearing, *In the Matter of the Commission's Investigation of Submetering in the State of Ohio* at ¶ 21 (June 21, 2017) (the "Second Entry on Rehearing").

² Complainant's Memorandum Contra Motion to Dismiss, *Cynthia Wingo v. Nationwide Energy Partners, LLC, et al.*, Case No. 16-2401-EL-CSS (Oct. 10, 2017).

³ AEP Ohio November 17, 2017 Memorandum Contra at 1.

⁴ Reply in Support of Amended Motion to Dismiss of Nationwide Energy Partners, LLC, *Cynthia Wingo v. Nationwide Energy Partners, LLC, et al.*, Case No. 16-2401-EL-CSS (Oct. 24, 2017).

⁵ *Toledo Premium Yogurt, Inc. dba Freshens Yogurt v. Toledo Edison Co., et al.*, Case No. 91-1529-EL-CSS, Entry (Sept. 17, 1992); *Michael E. Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS, Entry (Mar. 16, 1995); *Nader v. Colony Square Partners, Ltd.*, Case No. 99-475-EL-CSS, Entry (Aug. 26, 1999); *Pledger v. Capital Properties Mgmt., Ltd.*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004), *aff'd sub nom Pledger v. Pub. Util. Com.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14.

authorize a respondent in a complaint proceeding to assert, *by motion*, the defense of “lack of jurisdiction over the subject matter”⁶. Those cases all recognize that the *Shroyer Test* is a test of the Commission’s subject matter jurisdiction that is resolvable on a motion to dismiss without first requiring the parties to proceed to hearing. The Commission’s recognition that the *Shroyer Test* may be applied without a hearing is further supported by its decision in the Submetering Investigation to establish a “safe harbor” under the third prong of the *Shroyer Test*—something the Commission concluded would “facilitate an orderly and **expedient resolution** of any potential complaints.”⁷ In sum, the Commission and the Supreme Court of Ohio have repeatedly spoken on this issue—NEP’s motion to dismiss is the proper vehicle for applying the *Shroyer Test* in this proceeding.⁸

B. The Commission has all the evidence necessary to apply the *Shroyer Test* and dismiss NEP from the Complaint.

Neither Ms. Wingo nor AEP Ohio attempt in their respective Memorandum Contra to apply the *Shroyer Test* to Ms. Wingo’s circumstances, refute the material evidence submitted by NEP regarding the *Shroyer Test*’s three elements or its Safe Harbor, or specifically identify any further evidence that they believe must still be developed through a hearing in order for the Commission to apply the *Shroyer Test*.

Indeed, it is difficult to see how Ms. Wingo or AEP Ohio could challenge the outcome of the *Shroyer Test* urged by NEP, given the admissions in Ms. Wingo’s Complaint and the facts submitted with NEP’s Motion. For example, the first prong of the *Shroyer Test* asks whether

⁶ Ohio Admin. Code 4901-9-01(C)(1) (Emphasis added).

⁷ Second Entry on Rehearing at ¶ 41 (Emphasis added).

⁸ AEP Ohio cites to *Allnet Communications Services, Inc. v. Public Utilities Comm.*, 32 Ohio St. 3d 115, at page 2 of its Memorandum Contra for the proposition that Ms. Wingo’s complaint cannot be dismissed through a motion. That case, decided before *Pledger*, is inapplicable to this proceeding because it related to the Commission’s dismissal of a complaint as an untimely application for rehearing and did not address the issue here: whether an entity is a public utility subject to the Commission’s jurisdiction.

NEP “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?”⁹ **As Ms. Wingo has herself acknowledged**, NEP does not have certificates of public convenience and necessity to provide water and sewer services¹⁰ and NEP does not have a certified territory or authority to provide electric service.¹¹ Moreover, NEP’s evidence demonstrated that NEP does not have the power of eminent domain or the use of public rights of ways for utility purposes¹²—facts that Ms. Wingo also does not challenge.

As to the *Shroyer Test*’s second prong—*i.e.*, “is the utility service available to the general public rather than just to tenants?”¹³— NEP does not provide any *utility services* to tenants of Ms. Wingo’s apartment complex, The Creekside at Taylor Square (“Creekside”). Rather, the evidence demonstrates that NEP provides certain energy management services to Creekside’s owner, Creekside Acquisition Columbus Associates II, LLC (“CAC”), including meter maintenance, repair, and reading, paying the utility charges that CAC incurs from AEP Ohio and the City of Reynoldsburg and, on CAC’s behalf, invoicing and collecting utility charges from tenants.¹⁴

Notwithstanding that evidence, Ms. Wingo tries to muddy the waters by inviting the Commission to conclude that although no written service agreement exists between NEP and Ms. Wingo, Ms. Wingo is nonetheless NEP’s “customer” for jurisdictional utility services under an

⁹ Entry on Rehearing, *In the Matter of the Commission’s Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI at ¶ 3 (Feb. 1, 2017) (“First Entry on Rehearing”).

¹⁰ Complaint at ¶¶ 44-45.

¹¹ Complaint at ¶ 46.

¹² Motion to Dismiss, Exhibit 1, Affidavit of John Calhoun (“Aff. Calhoun”), ¶ 21.

¹³ First Entry on Rehearing at ¶ 3.

¹⁴ Aff. Calhoun at ¶¶ 8, 10.

“implied contract.”¹⁵ But Ms. Wingo does not attempt to ground her “implied contract” theory in any prong of the *Shroyer Test*. At most, her argument appears to be a rehash of the “submetered tenant-as-consumer” argument that has been soundly rejected by the Supreme Court of Ohio. See *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶ 37 (“Landlords are consumers of utility service, even though they resell that service to their tenants.”).¹⁶

Moreover, even if NEP was regarded as providing jurisdictional utility services to Ms. Wingo (which NEP is not, for all the reasons set forth in NEP’s Motion), that would still not be sufficient to deem NEP a jurisdictional public utility under the *Shroyer Test*, because, among other reasons, **those services are not being provided to the general public**. Rather, NEP’s services (which are, in fact, non-jurisdictional energy-management services), are provided solely to Creekside’s owner, CAC, under a contractual arrangement between NEP and CAC—not to the general public.¹⁷ For that reason, the Commission should find that NEP is not a public utility under the second prong of the *Shroyer Test*.

As to the *Shroyer Test*’s third prong—“[i]s the provision of utility service ancillary to [NEP’s] primary business?”—NEP presented evidence that it was not reselling electric, water, or sewer utility services at Creekside, whether primarily or secondarily. This evidence shows, for

¹⁵ Complainant’s Memorandum Contra Motion to Dismiss of Nationwide Energy Partners (Nov. 16, 2017) (“Memorandum Contra”) at 2.

¹⁶ Similarly, Ms. Wingo alleges that NEP is violating Ohio law by providing “metering service” and “billing and collection” service to CAC. Memorandum Contra at 3, n.2. Ms. Wingo is mistaken. Ohio law is clear that apartments, shopping centers, and similarly-situated entities can resell or redistribute submetered utility services to their tenants without falling under the Commission’s jurisdiction. See Finding and Order, *In the Matter of the Commission’s Investigation of Submetering in the State of Ohio* at ¶21 (Dec. 7, 2016) (noting that in *Shroyer*, “the Commission affirmed the right of apartment complexes, shopping centers, office buildings...and the like to redistribute utility services”). It follows that these entities do not become jurisdictional public utilities when engaged in the administrative tasks incident to submetering, like reading meters, preparing invoices, and billing tenants. Likewise, NEP does not become a jurisdictional public utility when it acts on a landlord’s behalf in performing these administrative tasks.

¹⁷ Aff. Calhoun at ¶¶ 2-5.

example, that with respect to water and sewer, NEP does not own or operate any meters or other facilities at Creekside related to water and sewer, that NEP does not take title to water delivered to Creekside, that NEP's services are limited to providing meter reading, meter repair and tenant billing and collection services on behalf of CAC, and that NEP's only interaction with the jurisdictional utility providing water and sewer services to Creekside—the City of Reynoldsburg—is to receive and pay, on CAC's behalf, the charges for those services that CAC incurs from the City.¹⁸

In response, Ms. Wingo implies that the bill from the City of Reynoldsburg included with NEP's motion to dismiss indicates that NEP, not CAC, is the customer of the City of Reynoldsburg.¹⁹ Ms. Wingo also contends that the summary listing of charges that AEP Ohio "issues" to NEP indicates that NEP is the customer of AEP Ohio.²⁰ Contrary to Ms. Wingo's claim, the City's bill, on its face, clearly identifies CAC as the City's customer for both water and sewer services.²¹ Likewise, the AEP Ohio October 2017 bill summary attached to Mr. Calhoun's affidavit reflects an account number (redacted) for CAC (listed as Creekside I) with a corresponding redacted service delivery identifier number.²² Given the utility billing records and the lease documents²³ that show that the landlord (CAC) provides electric, water and sewer services to Ms. Wingo, NEP is not the provider of utility service to Ms. Wingo at Creekside or a jurisdictional public utility under the third prong of the *Shroyer Test*.

¹⁸ *Id.* at ¶ 15.

¹⁹ Memorandum Contra at 3.

²⁰ Memorandum Contra at 3.

²¹ Aff. Calhoun at Ex. B.

²² Aff. Calhoun at Ex. A.

²³ See Utility Addendum attached to Exhibit A of Compliant, page 36/40.

Finally, with regard to electric service, NEP submitted evidence that it is not operating as a public utility under the third prong of the *Shroyer Test*, because, among other reasons, NEP qualifies for one of the Commission's Safe Harbors:²⁴

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 ... (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.

Neither Ms. Wingo nor AEP Ohio has challenged the fact that NEP qualifies for the Safe Harbor, and here again, there can be no actual dispute on this point. The evidence presented by NEP demonstrates that the invoiced charges to Ms. Wingo for electric usage at her apartment will not exceed, on an annualized basis, what she would otherwise be paying AEP Ohio under the default residential service tariff for equivalent usage. **And Ms. Wingo admits as much in her Complaint**, stating that she believes she is paying standard service offer rates for electric generation service.²⁵ Moreover, this is consistent with her lease, which states that “[r]ates per unit of water and electricity consumed shall be similar in cost with rates per unit billed by regulated utilities, including all applicable riders, line extension fees and customer charges.”²⁶

Finally, Ms. Wingo does not dispute—and cannot dispute—that since moving to her apartment at Creekside in June 2017,²⁷ she has always been invoiced by NEP on behalf of CAC for electric usage at her apartment in amounts less than standard default charges for residential service.²⁸ Ms. Wingo can easily confirm that this is the case simply by using the

²⁴ Second Entry on Rehearing at ¶ 40 (emphasis added).

²⁵ Complaint at ¶ 32.

²⁶ *Id.* (Emphasis added).

²⁷ Complaint at ¶ 55.

²⁸ Aff. Calhoun at ¶ 20.

AEP Ohio bill calculator available on AEP Ohio's website. And significantly, AEP Ohio also does not dispute NEP's use of AEP Ohio's bill calculator spreadsheets and Ms. Wingo's invoices (attached to the motion to dismiss) that show Ms. Wingo was charged less than standard default charges for residential service. Based on NEP's evidence, the lack of any contradictory evidence, and in the absence of any specific objection from Ms. Wingo, the Commission should conclude that NEP qualifies for the Safe Harbor, and therefore, that NEP is not a jurisdiction public utility under the third prong of the *Shroyer Test*.

III. CONCLUSION

The evidence submitted with NEP's Motion demonstrates that NEP Ohio is not operating as a public utility under the three prongs of the *Shroyer Test*. Although given an opportunity to do so, Ms. Wingo has not presented the Commission with any grounds to conclude otherwise, nor has she demonstrated that there are any factual disputes material to the *Shroyer Test* that remain to be resolved at hearing. Likewise, AEP Ohio only objects to NEP's motion to dismiss as premature and improper, an argument contrary to the unanimous decisions of both the Commission and the Supreme Court of Ohio. NEP has put forth sufficient and undisputed

evidence for the Commission to apply the *Shroyer Test* and grant NEP's motion to dismiss. For those reasons, the Commission should grant NEP's Motion and dismiss NEP from this case.

Respectfully submitted,

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Summary: Reply to Memorandum Contra by AEP Ohio and Complainant electronically filed by Mr. Michael J. Settineri on behalf of Nationwide Energy Partners, LLC