BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Cynthia Wingo,	)	
	)	
Complainant.	)	**Case No. 16-2401-EL-CSS**
	)	
v.	)	
Nationwide Energy Partners LLC, *et al.*	)	
	)	
Respondents.	)	

APPLICATION FOR REHEARING OF OHIO POWER COMPANY

Pursuant to Ohio Rev. Code Section 4903.10 and Ohio Adm.Code Rule 4901-1-35, Ohio Power Company ("AEP Ohio") respectfully files this Application for Rehearing of the Public Utilities Commission of Ohio's ("Commission") November 21, 2017 Finding and Order in this proceeding. That Finding and Order is unreasonable and unlawful in the following respects:

1. The Commission acted unreasonably and unlawfully by failing to rule favorably on AEP Ohio's motion to intervene before dismissing the complaint, thereby denying AEP Ohio's right to be heard.

2. The Commission acted unreasonably by failing to hold this proceeding in abeyance until such time as it rules on the pending Applications for Rehearing of the Second Entry on Rehearing in *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI.

3. The Commission's finding that reasonable grounds for the complaint had not been stated is unreasonable and unlawful.

The facts and arguments supporting these grounds for rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

Submetering for-profit causes substantial harm to utility customers and is at odds with the clear utility policies of the General Assembly, which the Commission usually vigorously implements. As to the former, submetering makes end use consumers captive customers and deprives them of their right to shop for competitive retail electric service. It keeps customers in the dark as to the mark up over actual cost the reseller is charging, and as to other important terms and conditions of the service being provided. Nothing stops a submetering entity from charging exorbitant rates that have no relation to its cost or the benefits provided. And submetering exposes consumers to unconstrained service disconnection and reliability failures. As to the latter, submetering for-profit is inconsistent with the state policies for the provision of retail electric service in articulated in R.C. 4928.02(B) and (C) to guarantee that consumers have the option to choose the supplier, price, terms, conditions, and quality retail electric service that best meet their needs.

These concerns prompted the Commission to open its investigation two years ago to address the proper regulatory framework to be applied to submetering entities. See *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI ("*Submetering Investigation*"). The *Submetering Investigation* brought to light the many abuses that are occurring, and may spread, as a result of for-profit submetering. And, Nationwide Energy Partner's (NEP) unique business model – reselling electric service marked-up over cost and sold for substantial profit – was unveiled as the poster child for those abuses.

The Commission responded by attempting to reformulate the traditional *Shroyer* test for determining whether an entity is a "public utility" – a test that predates the introduction of competitive retail electric service and was designed to address a very different set of

circumstances. *Id*., Finding and Order (Dec. 7, 2016); *id.*, Second Entry on Rehearing (June 21, 2017). But, many stakeholders, with diverse interests, maintain that the Commission's revised test, with its safe harbors that protect, rather than curtail, for-profit submetering, will permit the abuses to flourish to the detriment of end use consumers and undermine the regulatory landscape put in place by S.B. 221. *See e.g.id.,* Applications for Rehearing (July 21, 2017). These applications for rehearing remain pending, and may yet result, through Commission correction or Supreme Court review, in a new test more suited to protecting consumers by curtailing abusive submetering practices. The Commission's abrupt dismissal of this case, however, if not vacated, may make the final outcome of the *Submetering Investigation* a hollow victory for consumers shackled to NEPs' business model.

A. The Commission acted unreasonably and unlawfully by failing to act favorably on AEP Ohio's motion to intervene before dismissing the complaint.

AEP Ohio timely filed a Motion to Intervene in this proceeding on September 5, 2017, fourteen days before Complainant filed her Second Amended Complaint, and twenty-four days before Nationwide Energy Partners filed an Amended Motion to Dismiss. AEP Ohio fully established its right to intervene in the proceeding under R.C. 4903.221 and Ohio Adm.Code 4901-11(B)(5). *See* Motion to Intervene of Ohio Power Company (Sept. 5, 2017); Reply Memorandum in Support of Motion to Intervene of Ohio Power Company (Oct. 10, 2017). Indeed, AEP Ohio's right to intervene in this case is indisputable, given the Commission's finding in *In re Complaint of Mark A. Whitt*, Case No. 15-697-EL-CSS, a case that raised virtually identical challenges to NEP's business model. The Commission granted AEP Ohio's Motion to Intervene in that case, finding:

> AEP Ohio has a real and direct interest in this proceeding because it has the exclusive right to provide electric service to the customer in this case. * * * * AEP

> Ohio's intervention will significantly contribute to the full development and equitable resolution of this proceeding.

In re Complaint of Mark A. Whitt, Entry at ¶9 (Nov. 18, 2015).

In this case, the Commission did not act on AEP Ohio's motion for more than two months, and then in its November 21, 2017 Finding and Order concludes that it "need not address AEP Ohio's motion to intervene in this proceeding, before ruling on NEP's motion to dismiss the complaint, as the salient facts do not appear to be in dispute." Finding and Order, ¶ 21. That conclusion is unlawful and unreasonable.

The Ohio Supreme Court has recognized that it is an abuse of discretion for the Commission not to grant intervention when the intervenor's interests are adversely affected and not represented by another party and intervention will not unduly delay the proceedings or cause prejudice to any party. O*hio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 18. According to the Court, "intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO." *Id.* at ¶ 20. The fact that a case is was ultimately concluded without the need for an evidentiary hearing is immaterial; it is nevertheless an abuse of discretion to not allow intervention, where proper, and thereby deny the intervenor any opportunity to be heard on the matter. *Id*. ("Even if no hearing was scheduled or contemplated when the Consumers' Counsel sought to intervene, her motions and accompanying memoranda properly addressed the relevant criteria of R.C. 4903.221. In our view, whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.")

The Commission's failure to allow AEP Ohio to be heard before the complaint was dismissed is highly prejudicial in this instance because it foreclosed AEP Ohio's right to advance

alternative arguments as to how the case should proceed and/or how the law (which remains subject to the still pending applications for rehearing in the *Submetering Investigation*) should be applied. In its order dismissing the complaint, the Commission adjudicated the ultimate issue in dispute, holding that NEP is not a public utility based on the newly recognized safe harbor established in its Second Entry on Rehearing in the *Submetering Investigation.* The Commission made this finding because the Complainant did not dispute the salient facts set forth in the uncontested affidavit submitted by NEP. Finding and Order, ¶ 26. It was able to take the liberty to summarily dismiss the Complaint because Complainant appears to have conceded that the newly-revised *Shroyer* test controlled the merits of this case and elected to oppose the motion to dismiss on narrow procedural grounds. *See* Complainant's Mem. Contra Motion to Dismiss of Nationwide Energy Partners at 3-5 (Oct. 10, 2017). This likely will result in precluding or estopping on *res judicata* theories the Gateway Lakes tenants from challenging NEP's status in a future proceeding, even if the Commission or the Court ultimately agrees with AEP Ohio and others that the safe harbor provisions should be eliminated because they fail to appreciate the realities and effects of NEP's for-profit business model, and obscure the obvious, common sense conclusion that NEP's primary business is supplying utility service for-profit.

AEP Ohio's position is this case differs substantially. AEP Ohio contends that the Commission should have held this case in abeyance, until the pending applications for rehearing in the *Submetering Investigation* are resolved, and any appeal of the Commission's final Entry on Rehearing is concluded. This is the approach the Commission took in *Whitt*, Case No. 15-697-EL-CSS, and it would have been the proper approach in this case as well. Indeed, a more compelling case may be made for abeyance of this case, given that the *Submetering Investigation* is now much closer to a final resolution.

AEP Ohio further contends that the question of whether the new *Shroyer* safe harbors are lawful and proper in the context of submetering for-profit by an entity that has no other relationship to the end use consumer other than reselling noncompetitive and/or competitive electric service should not be conceded or waived until such time as the question is addressed by the Ohio Supreme Court on appeal. To do so exposes the Gateway Lakes tenants to the risk of discriminatory treatment in the event that the Commission again modifies the test in a further entry on rehearing or the Court rejects the new test as unlawful or unreasonable.

Thus, because the Commission's failure to grant AEP Ohio's motion to intervene had a discernable adverse impact on AEP Ohio's ability to advocate for a particular outcome and to preserve all its arguments for appeal, the Commission's Finding and Order is unlawful and unreasonable. The Commission should grant rehearing for the purpose of allowing AEP Ohio to intervene and present and preserve its arguments.

B. The Commission acted unreasonably by failing to hold this complaint proceeding in abeyance until such time as it rules on the pending Applications for Rehearing of the Second Entry on Rehearing in the *Submetering Investigation.*

The Commission has the inherent authority to control its own dockets and determine which issues will be heard in which docket, and typically exercises that authority to assure that all parties can effectively advocate their respective positions when dockets overlap. *See e.g. In the Matter of the Application of MFS Intelenet of Ohio, Inc. for a Certificate of Public Convenience and Necessity to Operate as a Local Exchange Company in Certain Specified Areas*, Case No. 94-2019-TP-ACE, 1995 Ohio PUC LEXIS 179, *12, Concurring Opinion (Mar. 9, 1995). It exercised that authority in the *Whitt* complaint case, deferring the adjudication of a single complaint that NEP violated the law in reselling utility service to end use consumers pending the outcome of the broader *Submetering Investigation*. And it should have done so in

this case as well because of the pending applications for rehearing and likely appeals in the *Submetering Investigation*.

The Commission and numerous stakeholders have invested considerable time and resources in presenting their arguments in the *Submetering Investigation*. The proceeding has been ongoing for two years and has produced an evolving test to determine whether a submetering entity is a public utility. In its initial Finding and Order of December 7, 2016, the Commission extended the *Shroyer* test to condominium associations, submetering companies, and other similar situated entities but modified the test based upon "comments we received regarding the unreasonably high rates and charges on the resale or redistribution of utility service to submetered customers." *Submetering Investigation*, Finding and Order, ¶ 19. The Commission modified the third prong of the *Shroyer* test (whether the provision of utility service is merely "ancillary to the landlord's primary business") to create a rebuttable presumption that the provision of utility service is <u>not</u> ancillary to the landlord's or other entity's primary purpose if the landlord or other entity resells or redistributes utility services and charges an end use customer at "a threshold percentage above the total bill charges for a similarly-situated customer served by the utility's tariffed rates, an electric utility's standard service offer, or a natural gas utility's standard choice offer." *Id*., ¶ 16. The Commission noted that the entity would have the opportunity to overcome the presumption by presenting evidence that the provision of utility service is indeed ancillary to its primary business, *e.g.* "evidence demonstrating that, irrespective of the individual customer's bills, the landlord or other entity provides utility service, in the aggregate, at cost." *Id*., ¶ 18.

More than a dozen stakeholders filed applications for rehearing, advancing competing, and sometimes conflicting, arguments as to why the Commission's revised *Shroyer* test was

unlawful, ineffective, or unworkable. In response, the Commission again substantially modified the new test, mostly to accommodate NEP's desired outcome. Of most significance, the Commission granted NEP's sixth assignment of error and created the safe harbors that allow a submetering entity to overcome the rebuttable presumption that would render it a public utility in violation of Ohio law by demonstrating: 1) that it is "simply passing through its annual costs of providing utility service charged by a local public and competitive retail service provider (if applicable)" or 2) that its "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." *Submetering Investigation*, Second Entry on Rehearing, ¶ 40.

On July 21, 2017, ten stakeholders filed applications for rehearing, which applications remain pending. The applications for rehearing raise substantial concerns about the lawfulness, effectiveness, and practicality of the new safe harbors protecting for-profit submetering entities. The rehearing requests that were granted for further consideration include the joint EDU request that the Commission clarify that the Safe Harbor adopted in the *Submetering Investigation* applies only to the third prong of the *Shroyer* Test and a submetering entity can still be deemed a public utility under the first and second prongs even if it is within the Safe Harbor under the third prong. (*Submetering Investigation*, July 21, 2017 Joint Application for Rehearing of Ohio Power and Duke Energy Ohio at 7-8.) If that request is granted – which is merely a clarification of what should already be evident – then a complaint such as the one brought in this case could proceed on matters other than the Safe Harbor determination exclusively relied upon by the Commission in dismissing this case. Logically and fairly, the Commission should address these concerns *before* it applies the safe harbor provisions in any particular case. Failing to do so will

inevitably result in discrimination between end use consumers who, like Ms. Wingo, have a complaint dismissed based on the application the current safe harbors and all other end use customers who will be protected from unreasonable utility charges and practices should the Commission or the Court eliminate the safe harbors in favor of a lawful alternative that truly protects consumers and the integrity of the competitive retail electric framework in this state. Failing to address the rehearing arguments in the *Submetering Investigation* before resolving complaint cases such as this one also will most likely result in questionable and contentious litigation over the scope and effect of the Commission's finding in this proceeding, and it could encourage the proliferation of the for-profit submetering business model.

The Commission should vacate its November 21, 2017 Finding and Order until such time as the Submetering Investigation is concluded and reviewed by the Ohio Supreme Court.

C. The Commission's finding that reasonable grounds for the complaint had not been stated is unreasonable and unlawful.

The Commission dismissed Ms. Wingo's complaint solely because she did not rebut NEP's assertions that it satisfied the *Shroyer* test, as transformed in the *Submetering Investigation* to become the Relative Price and Safe Harbors test, which generously favors submetering entities. Finding and Order, ¶ 26 (finding that NEP's resale of utility service to Ms. Wingo falls within the second safe harbor because NEP's charges were less than what she would have paid for the same period and usage under the default service tariff on an annualized basis). The Commission's finding is unlawful and unreasonable because the two safe harbors themselves are unlawful and unreasonable when applied to for-profit submetering entities, like NEP. AEP Ohio, and others, fully addressed the unlawfulness and unreasonableness of the new submetering safe harbors in the pending applications for rehearing in the *Submetering Investigation*. AEP Ohio incorporates its own July 21, 2017 Application for Rehearing in that

proceeding by reference here. The same facts and arguments advanced there apply in equal measure here to demonstrate the error in the Commission's premature application of the second safe harbor in this proceeding.

As more fully addressed in AEP Ohio's *Submetering Investigation* Application for Rehearing, the safe harbors cannot legally, fairly, or rationally be applied to for-profit submetering entities, like NEP. The third prong of the *Shroyer* test was intended to discern whether the entity providing utility service was doing so merely "ancillary to its primary business." The test is appropriate when the entity being tested has some business beyond the provision of utility service, but the test is meaningless when it is applied to an entity, like NEP, whose sole business is the provision of utility service. Unlike a landlord, developer or other entity that may reasonably be found to provide utility service ancillary to its primary business, a for-profit submetering entity has no relationship with the end use consumer unrelated to the provision of utility service.

R.C. 4905.02 is very straightforward in declaring that an entity is an "electric light company" if it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state." The conclusion that NEP and similar entities that markup and sell distribution and/or generation service to end use consumers for-profit are not "engaged in the business of supplying electricity," R.C. 4905.02(C), is impossible to fathom. That is why the appropriate test to be applied to determine if a submetering entity or other reseller is a public utility is whether the entity marks up master metering service and makes a profit from submetering. Making a profit on the sale of utility service is a bright-line test for distinguishing those entities that are "engaged in the business of supplying electricity" from those that are merely providing utility service ancillary to their primary business. And it is a test

that fully conforms to the statutory law and is consistent with the third prong of the traditional *Shroyer* test. It is the test that should have applied in this case. Accordingly, the Commission acted unreasonably and unlawfully when it concluded that Ms. Wingo failed to state reasonable grounds for complaint in this case.

CONCLUSION

For all the foregoing reasons, Commission should vacate its November 21, 2017 Finding and Order and hold this case for decision until after the pending applications for rehearing, and any appeals, in the *Submetering Investigation* are concluded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Ohio Adm. Code 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Application for Rehearing* was sent by, or on behalf of, the undersigned counsel to the following parties and counsel of record via e-mail on this 21st day of December, 2017.

/s/ Steven T. Nourse
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