BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING OF
COMPLAINANT CYNTHIA WINGO

Complainant Cynthia Wingo requests rehearing of the October 24, 2018 Finding and Order (Order) dismissing the Complaint. The Order is unreasonable and unlawful because:

1. **The Commission applied the "modified" *Shroyer* test to prematurely adjudicate the claims and defenses raised in this proceeding on the merits, in violation of R.C. 4903.082, R.C. 4905**.26 and R.C. 4928.08.

2. **The Commission's findings of facts and conclusions of law are unsupported by the record and contrary to law, in violation of R.C. 4903.09, and unreasonable and unlawful under R.C. 4903.13.**

This application for rehearing should be granted under R.C. 4903.10 and for the reasons explained in the following memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

When a complaint is filed with the Commission, several things must happen before the Commission may address the claims and the respondent's defenses on the merits.

First, the Commission must ensure it has subject matter jurisdiction to decide the claims alleged. *See, e.g.*, R.C. 4905.04 (conferring jurisdiction to regulate "public utilities").

Second, "reasonable grounds for complaint" must be alleged. R.C. 4905.26. For a complaint "to meet the 'reasonable grounds' test, it must contain allegations, which if true, would support the finding that the rates, practices, or services complained of are unreasonable or unlawful."[1]

Third, the Commission must allow the parties to pursue discovery. R.C. 4903.082. ("All parties and intervenors shall be granted ample rights of discovery.") Parties need discovery to develop the factual record and challenge their opponent's claims or defenses.

Fourth, the Commission must hold a hearing. R.C. 4905.26 leaves no discretion; the Commission "shall" schedule a proceeding where the complainant "shall be entitled to be heard."

The Commission may not decide the case until all of these things happen. The order announcing the decision must contain "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." R.C. 4903.09.

[1] Order ¶ 82, quoting *In re Consumers' Counsel v. W. Ohio Gas Co.*, Case No. 88-1743-GA-CSS, Entry at 10 (Jan. 31, 1989).

This case was not decided like other complaints. It was never really "decided" at all, at least in the ordinary sense of the term. The very structure of the Order shows that the Commission made a decision first—that the Complaint should be dismissed—and then set out to rationalize this decision. The Order dials in on arguments that support the Commission's predetermined decision and minimizes or ignores arguments that challenge the decision. A behavioral psychologist would call this decision-making process "confirmation bias." The Supreme Court of Ohio will call it "reversible error."

The Commission's attempt to rationalize its decision is circular and conclusory, and ultimately begs the question of what exactly the Commission did. The only thing known for sure is that the Complaint is dismissed. Everything beyond that remains a mystery. The Complaint alleges that one or more Respondents are operating unlawfully as a "public utility" or "electric services company," but the Order never really addresses this issue. The Commission ignores statutory definitions and relies on the *Shroyer* test.[2] But instead of applying the *Shroyer* test to the alleged *providers* of service, the Commission applies the test to the *service*, and refers to the providers with terms like "Landlord," "Creekside Landlord," or "CACA," as well as the "agents" of these unknown entities.[3] None of the terms are defined, so it is impossible to know who the Commission is talking about.

The Order contains no findings—zero—on basic factual questions, such as whether any Respondent is a "Reseller," the identity of Ms. Wingo's "landlord," or the "owner" of the Creekside apartments. Elsewhere, the Order blanketly asserts that certain unidentified entities

[2] *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS et al., Opin. & Order (Feb. 27, 1992).
[3] *See, e.g.*, Order ¶¶ 64-70.

(who may or may not be Respondents in this case) are "agents" of other unidentified entities, with no citations to the record, no explanation for this finding, and no discussion of the significance of this finding. Even the basic question of whether the Commission dismissed for lack of subject matter jurisdiction or failure to allege reasonable grounds for complaint remains unanswered. The Commission discusses these very different grounds for dismissal as if they were one in the same. The Order falls well short of what is required under R.C. 4903.09.

If the Court cannot determine what the Commission did and why, it has no choice but to remand. In this case, the remand will be accompanied by a reversal on the questions of law decided in the Second Entry on Rehearing in the Commission Ordered Investigation of Submetering in the State of Ohio (COI Entry)[4] and applied here, and instructions to the Commission to decide this case as it would any other—by allowing discovery, conducting a hearing, and rendering a decision based on Ohio law, not the made-up law announced in the COI.

The Commission has jurisdiction to allow discovery and set this case for hearing, but it cannot decide this case in a manner contrary to R.C. 4905.26. The Commission must grant rehearing, rescind dismissal, and allow the Complaint to proceed.

II. ARGUMENT

"The Public Utilities Commission of Ohio is the representative of the people of the state of Ohio. It is the intermediary between the citizen-consumer on the one side and the public utility on the other. It is a creature of statute, having only such power as the General Assembly

[4] Case No. 15-1594-AU-COI, Second Entry on Rehearing (June 21, 2017).

has seen fit to confer upon it [.]" *Coalition for Safe Elec. Power v. Public Util. Comm'n*, 49 Ohio St.2d 207, 210 (1977) quoting *Cleveland v. Public Util. Comm'n*, 127 Ohio St. 432, 435-436 (1934).

The General Assembly has directed the Commission to regulate "public utilities" and "electric services companies." *See* R.C. 4905.02; 4905.03; 4905.04; 4928.01(A)(9); 4928.08. The Commission must hear complaints against these entities. *See* R.C. 4905.26 and 4928.16(A)(1). Where "reasonable grounds for complaint" have been alleged, the Commission must permit discovery, conduct an evidentiary hearing, and decide the case through a written order explaining the basis for the decision. *See* R.C. 4903.082; R.C. 4903.09.

In the COI Entry, the Commission acknowledged: "[O]ur consideration whether any individual Reseller is a public utility must be made after the development of an evidentiary record in a complaint case."[5]

In the Order, the Commission states: "Accordingly, this Commission must weigh the facts and circumstances of each case in determining whether any specific resale arrangement constitutes jurisdictional public utility service within the context of a particular complaint case."[6]

The Order is not only unreasonable and unlawful under settled Ohio law, but contrary to the standard the Commission purportedly applied.

[5] COI Entry ¶ 31.
[6] Order ¶ 60.

A. The Commission applied the "modified" *Shroyer* test to prematurely adjudicate the claims and defenses raised in this proceeding on the merits, in violation of R.C. 4903.082 and 4905.26.

The Commission dismissed the Complaint because: "[W]e find that the Complainant has failed to set forth reasonable grounds under the *Shroyer* Test, and reasonable grounds are a prerequisite for the complaint to be set for hearing under R.C. 4905.26."[7] On appeal, the Court will immediately recognize that the clause "under the *Shroyer* Test" is out of place.

1. The Complaint *alleges* reasonable grounds, and the Order renders no express finding to the contrary.

The Order acknowledges the standard of review for determining reasonable grounds for complaint: for a complaint "to meet the 'reasonable grounds' test, it must contain allegations, which if true, would support the finding that the rates, practices, or services complained of are unreasonable or unlawful."[8] Each of the 11 counts of the Complaint cite a statute or rule applicable to the Respondents' activities. Each count alleges facts that, if proven, would show that respondents have violated these statutes or rules. The Complaint satisfies the statutory "reasonable grounds" requirement.

The Order does not address R.C. 4905.26 or the "reasonable grounds for complaint" standard until page 33, paragraph 80—*after* announcing that the Complaint is dismissed. The decision described in the Order is not a decision on the *pleadings*, but a decision on the merits based on the *Shroyer* test. The Commission never determined, one way or the other, whether the Complaint *alleges* reasonable grounds to consider the issues raised. But because the Commission

[7] Order ¶ 85.

[8] Order ¶ 82, quoting *In re Consumers' Counsel v. W. Ohio Gas Co.*, Case No. 88-1743-GA-CSS, Entry at 10 (Jan. 31, 1989).

did consider the issues raised (or at least some of them), the Commission cannot logically claim that the pleading presenting these issues did not allege reasonable grounds.

2. The Commission considered the allegations and defenses on the merits without allowing discovery or conducting a hearing.

By implication, the Commission determined that reasonable grounds for complaint were alleged. But instead of allowing Ms. Wingo to proceed with discovery and a hearing, the Commission decided the allegations by applying the *Shroyer* test. The Order offers three reasons for not allowing discovery or a hearing, and all three are baseless.

The Order first claims, "broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony."[9] The Order never actually finds that the allegations here are "broad" or "unspecific," nor can it. The 100-plus paragraph Complaint, summarized in seven pages and 13 paragraphs of the Order, alleges 11 separate, targeted counts. The Commission's conclusory assertion does not satisfy R.C. 4903.09. *See In re Application of Duke Energy Ohio, Inc.*, 2016-Ohio-7535, ¶ 23, 148 Ohio St.3d 510 (Commission's "conclusory statement" deemed "insufficient to enable us to determine how it reached its decision.").

Next, the Order asserts that "Complainant has the burden of proving her complaint, including that she suffered some injury, in this proceeding."[10] It is not clear whether the Order is claiming an alleged failure to meet the burden of proof generally or an alleged burden of proving injury, but the Order is wrong either way. Ms. Wingo has no burden of *proving* anything at the pleadings stage; her only burden is to plead *allegations* demonstrating

[9] Order ¶ 82, quoting *In re Consumers' Counsel v. Dayton Power & Light Co.*, Case No. 88-1085-EL-CSS, Entry at *4 (Sept. 27, 1988).
[10] Order ¶ 83.

reasonable grounds for complaint. *Coalition for Safe Elec. Power v. Public Util. Comm'n,* 49 Ohio St.2d 207, 207 (1977) ("Upon the *allegation* of reasonable grounds for relief in a complaint filed by any party enumerated in R.C. 4905.26, the [Commission] *shall* schedule and hold a hearing after giving notice accordingly." (Emphasis added.) She met this burden for the reasons already explained. The Complaint also alleges "injury," as the Order itself recognizes:

> The Complainant asserts that tenants who were customers of AEP Ohio lost regulatory protections overnight and are now routinely disconnected, threatened with eviction in the winter, and assessed late fees and penalties. Moreover, the Complainant asserts, these tenants are denied the ability to shop for a competitive supplier, and forced to pay common area charges for usage they have no ability to control.[11]

If the matters alleged do not constitute "injury," it is hard to imagine what does. Again, conclusory, unsupported assertions are insufficient.

Third, the Order claims, "pleadings and admissions by the parties may be sufficient to determine if reasonable grounds for the complaint exist."[12] The only authority cited, *Stephens v. Public Util. Comm'n*, 2004-Ohio-1798, 102 Ohio St.3d 44, 47, involved a telecom proceeding under R.C. 4927.03. That statute allows the Commission to conduct a hearing "if it considers one necessary." R.C. 4927.03(A)(1); *see also Stephens*, 102 Ohio St.3d at 47. ("The General Assembly chose to require only a streamlined 'notice and comment' process. A notice-and-comment process necessarily does not involve an adversarial evidentiary hearing [.]"). Unlike the statute at issue in *Stephens*, R.C. 4905.26 requires more than a "notice and comment" process. R.C.

[11] Order ¶ 51.

[12] Order ¶ 84.

4905.26 entitles the party bringing a complaint to discovery and a hearing. R.C. 4903.082; R.C. 4905.26.

The Order cobbles together these three unsupported finding to conclude: "The Complainant asserts that she is entitled to an opportunity for discovery and an evidentiary hearing. However, she does not identify any facts that, if proven at hearing, would change the outcome of our analysis under the Safe Harbor provision of the *Shroyer* Test."[13] Ms. Wingo was not allowed to challenge NEP's "facts" or develop her own. She sought discovery to explore the assertions in NEP's affidavit, but the Commission ignored her, never ruling on NEP's motion for protective order.[14] Discovery and a hearing were irrelevant to the Commission because, again, the Commission had already made up its mind.

The Commission cannot resolve complaints through summary judgment, as the Order itself recognizes.[15] Ms. Wingo was entitled to discovery and a hearing, and these rights were unlawfully denied. *See W. Res. Transit Auth. v. Public Util. Comm'n*, 39 Ohio St.2d 16, 19 (1974) (remanding decision where "[t]he above-quoted procedural requirements in R.C. 4905.26 are clear, but were not observed by the commission[.]"); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 64 Ohio St.3d 145, 148 (1992) (remanding decision where the Commission failed to satisfy "the procedural requirements of R.C. 4905.26.").

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[13] Order ¶ 87.

[14] *See* Complainant's Notice of Deposition (Jan. 9, 2018); NEP Motion for Protective Order (Jan. 26, 2018); Complainant's Memorandum Contra Motion for Protective Order (Feb. 12, 2018); NEP Reply (Feb. 20, 2018).

[15] Order ¶ 82. *See also Dennewitz v. Dominion East Ohio*, Case No. 07-517-GA-CSS, Entry ¶ 5 (Oct. 24, 2007) ("There is no summary judgment provision in the Commission's [Rules of Practice].")

3. *Shroyer* does not control whether the Complaint alleges reasonable grounds.

Shroyer bears no relevance to the question of whether reasonable grounds for complaint have been alleged, and is only minimally relevant to the merits question of whether an entity is a "public utility." Thus, even if a summary judgment-type process could be appropriate in some circumstances, it is not appropriate here. Summary judgment may only be granted where the moving party is entitled to judgment "as a matter of law," and *Shroyer* is not the law. *See* Ohio Civ. R. 56; R.C. 4903.082 ("Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.")

The General Assembly defines an entity as a "public utility" when "engaged in the business of supplying" the services described in R.C. 4905.03(A-E). This definition presents a mixed question of law and fact.[16] "Although case law provides a list of characteristics common to public utilities, it is generally recognized that none of these characteristics is controlling."[17] Rather, "[w]hether a corporation is operating as a public utility is determined by the character of the business in which it is engaged." *Industrial Gas Co. v. Public Util. Comm'n*, 135 Ohio St. 408, syllabus ¶ 1 (1939).

In *Shroyer*, the Commission recognized (after a hearing) that any right of resale is limited to the *property owner*, and only then to consumption occurring at the owner's property. By extending sewer service to just *one customer* outside the owner's property, the Commission found that the owner could be engaged in the business of a sewage disposal company. "If Respondent is providing sewer service to those who are not tenants of or affiliated with

[16] Order ¶ 60, citing *Marano v. Gibbs*, 45 Ohio St. 310, 311 (1989).
[17] *Id.*, citing *Montville Bd. of Twp. Trustees v. WDBN, Inc.*, 10 Ohio App.3d 284 (9th Dist. 1983).

Respondent then Respondent may be operating a sewage disposal system company subject to our jurisdiction." *Shroyer* at 11. Later, *Pledger v. Public Util. Comm'n*, 2005-Ohio-0105, 109 Ohio St.3d 463, affirmed an entry dismissing a complaint specifically because of the "similarities between the facts and legal questions in *Shroyer* and those in this case." *Id*. at ¶ 21.

The *Shroyer* factors are borrowed from cases describing the common law characteristics of a "public utility." *See Haning v. Public Util. Comm'n*, 86 Ohio St.3d 121, 128 (1999). But these common law factors do not control the statutory definition. *Id*. (Commission failed to "point[] to a single decision of the commission or this court wherein a business enterprise was determined to be a public utility for purposes of application of R.C. Title 49 by reference to common-law, public-utility characteristics to the exclusion of consideration of the statutory characteristics described in R.C. 4905.03.") The Court has found that entities not meeting the common law characteristics described in *Shroyer* may still fall under the statutory definition of a "public utility." *See, e.g., Industrial Gas Co. v. Public Util. Comm'n*, 135 Ohio St. 408, 409 (1939); *Atwood Resources, Inc. v. Public Util. Comm'n*, 43 Ohio St.3d 96, 102 (1989).

The Commission ignored the distinction between common law and statutory factors in *Haning*, ignored the distinction in the COI, and continues to ignore the distinction here. The Commission ignores arguments at its peril. *In re Application of Duke Energy Ohio, Inc.*, 2016-Ohio-7535, ¶ 20, 148 Ohio St.3d 510, (order reversed where Commission acknowledged party's argument "but did not specifically address it."); *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 2016-Ohio-1607, ¶ 53, 147 Ohio St.3d 59 (same).

The Commission has never explained why the *Shroyer* factors should apply to the exclusion of other relevant characteristics. "Waiting until appellate briefing to explain the basis

or authority for a commission decision does not satisfy R.C. 4903.09." *In re Application of Duke Energy Ohio, Inc.*, 2016-Ohio-7535, ¶ 24, 148 Ohio St.3d 510, 516. The Order claims the Commission must consider all relevant facts and circumstances based on the "evidentiary record" in a complaint case,[18] but as explained below, that is clearly not what it did here.

4. The "modified" *Shroyer* test is contrary to law.

Shroyer is a problem for NEP because NEP does not own the properties it serves. In 2015, the Commission did something no one can recall ever being done before: it stayed pending litigation against NEP and opened an investigation to "consider modifications to the *Shroyer Test* before we consider the evidence to be proffered in the Whitt Complaint Case."[19] The "modifications" announced in the COI Entry did not simply tweak *Shroyer*. The "Rebuttable Presumption," "Relative Price Test," and not one but two "Safe Harbors" eviscerate the original test. These new gimmicks reverse course on the Commission's previous finding that the rates charged are irrelevant in determining whether the property owner is a public utility; for all practical purposes, the rates charged are now the dispositive factor.

The Order never explains how the "modifications" to *Shroyer* bear any relevance whatsoever to whether an entity meets the statutory definition of "public utility." The Order simply declares, "[a]fter reviewing the pleadings and factual admissions of record in this particular case, we reaffirm our determination that that these modifications to the third prong

[18] Order ¶ 52.

[19] COI Entry ¶ 14. The Commission refused to lift the stay even after issuing an order in the investigation, so the Whitt complaint was dismissed.

of the *Shroyer* Test provide a reasonable basis for determining whether residential submetered arrangements should be subject to this Commission's jurisdiction."[20]

The *Shroyer* modifications are not a "reasonable basis" for deciding whether an entity is a "public utility" by mere assertion. "'[D]ue deference' does not mean that we automatically and uncritically accept whatever the commission pronounces." *Consolidated Rail Corp. v. Pub. Util. Comm.* 47 Ohio St.3d 81, 84 (1989). The Commission must cite evidence and explain its reasoning, and it did not do so. *See In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 2016-Ohio-1607, ¶ 55, 147 Ohio St. 3d 59 (reversing where "the commission's order contains no record citations relevant to the pertinent issue, despite a claim that it reviewed all of the testimony."). A generic reference to "pleadings" or "factual admissions" does not comply with R.C. 4903.09.

Nor can the Commission claim that because it found the modifications "reasonable" in the COI, those findings are binding here. "R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, this court has held that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders." *Allnet Commc'ns Servs., Inc. v. Pub. Utilities Comm'n*, 32 Ohio St. 3d 115, 117 (1987).

The Complaint is not, however, a "collateral attack" of the COI Entry. Regardless of any authority to commence investigations, the resulting COI Entry is either an unenforceable, unreviewable advisory opinion or an unlawful rule. *See* R.C. 111.15(A)(1) (defining "rule" as

[20] Order ¶ 73.

"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 [.]" (emphasis added)).;[21] The COI Entry was developed from and applies to purely hypothetical scenarios, and the Court will not address "merely hypothetical" questions. *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 2016-Ohio-1607, ¶ 59, 147 Ohio St. 3d 59 ("[T]he question of a regulatory taking is hypothetical, so we refuse to address it.") Even if the COI Entry is eventually upheld, a complaint is the only viable mechanism for challenging a rule. *Craun Transp. v. Pub. Utilities Comm'n*, 162 Ohio St. 9, 10 (1954) ("As there has been no attempt to enforce the rules against the appellants, they have not been affected by the rules in any way, and the validity of the rules can be determined only when that question arises in connection with a matter that is justiciable.")

The "modified" *Shroyer* test simply ignores statutory definitions and controlling cases. This test is not the law, and it was unreasonable and unlawful to apply it.

B. The Commission's findings of facts and conclusions of law are unsupported by the record and contrary to law, in violation of R.C. 4903.09 and 4903.

The Commission "must provide in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *Tongren v. Public Util. Comm.*, 85 Ohio St.3d 87, 89, (1999) (quotation omitted.) The Commission failed to explain its findings on several issues. "A legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 163, 166.

[21] The COI Entry is to establish standards the Commission "will apply" to utility service Resellers on a "case-by-case basis." COI Entry ¶¶ 4, 11, 20, 26, 30, 40, 49, 50. The COI Entry also discusses contexts in which the Commission "will not apply" these standards. *Id.* ¶¶ 1, 11, 28, 50.

1. The Commission failed to engage in the fact-finding necessary to apply the modified *Shroyer* test.

The Order does not engage in the fact-finding necessary to apply *any* test, let alone the test developed in the COI. "Ruling on an issue without record support is an abuse of discretion and reversible error." *In re Application of Columbus S. Power* Co., 2011-Ohio-1788, ¶ 29, 128 Ohio St. 3d 512, 519.

According to the COI, "[i]f any entity resells or redistributes public utility service, the Commission will apply the *Shroyer Test* to that entity to determine if it is operating as a public utility, and then whether it is doing so unlawfully."[22] To apply this test, the Commission must know something about the facts: who is selling service, who is buying service, whether any resale of service has occurred, and the terms and conditions of the sale and resale. The Order contains no findings on any of these matters.

With respect to gas service, the Order finds that because no "resale or redistribution" occurred, there is "no need to apply the *Shroyer* test."[23][24] But the Order fails to consider that NEP and the Crawford Respondents deny that they are resellers of water/sewer and electric service. NEP claims that "CAC is the responsible party for *all* water, sewer and electric utility service

[22] Case No. 15-1594-AU-COI, Finding and Order ¶ 17 (Dec. 7, 2016).

[23] Order ¶ 56.

[24] The Order finds that Knox is the "sole provider of natural gas distribution service," that Knox "provides such service directly to its members through its own lines and meters," and that Knox "bills its members directly for natural gas service based on readings from Knox's meter at the tenant's premises[.]" Order ¶ 55. These findings would hold true by replacing "Knox" with "NEP" and "gas" with "electric." Like Knox, NEP is the sole entity that bills residents for electric service. Like Knox, NEP bills consumers directly. Like Knox, NEP's bills are based on readings from meters owned by NEP. The Order never explains how Knox and NEP are different—if they are different.

arrangements at Creekside."[25] The Order makes no affirmative finding whether any of these entities—NEP, the Crawford Respondents, or CAC—are "Resellers." Under the Commission's own logic, the factual predicate for applying the *Shroyer* test to water/sewer and electric service—whether the entity is a "Reseller"—has not been established.

The Order then claims that the "resale of submetered residential water service and sewage disposal service in the case now before us is similar to that in *Pledger*" and "virtually identical to those provided to the mobile home parks in *Aquameter*."[26] This finding implies that the Commission compared the services here and the services at issue in these prior cases. The Order reveals no such comparison. "PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5789, ¶ 34, 111 Ohio St. 3d 300, quoting *MCI Telecommunications,* 32 Ohio St.3d at 312.

The Commission cannot compare Ms. Wingo's services because the record will not permit it. The Order neither acknowledges nor resolves the factual disputes over the identity of the "owner" of the Creekside apartment complex (the Crawford Respondents deny that they are the owners; NEP speculates that a different Crawford entity is the owner); the identity of the "landlord" (everyone seems to agree it is *not* NEP, but the Crawford entities deny that they are the landlord); whether Ms. Wingo is a "customer" of NEP (NEP renders bills to her directly, but denies she is a customer); and even the basic question of whether *any* Respondent renders *any* service to Ms. Wingo (all deny that they do). The Order renders no findings about the identity

[25] NEP Motion to Dismiss at 6 (emphasis in original). CAC is not a party in this case.
[26] Order ¶ 66.

of the parties engaged in an initial "sale" of utility service; whether a "resale" occurred; and if so, the parties to the sale or resale.

The Order deals with the disputed, unresolved record by disregarding the *providers* and focusing on the *service*. Because the Commission simply does not know who provides the service, the Order purports to apply the *Shroyer* test to the "Landlord" (sometimes capitalized, sometimes not), "Creekside," "Creekside Landlord," "CACA" (presumably CAC, a non-party) unidentified "Resellers," and unidentified agents of these unidentified entities.[27] None of these terms are defined in the Order (or anywhere else). The Order *literally* fails to render any factual findings *at all* about the status of any Respondent as a service provider or "Reseller."

"Suffice it to say, some factual support for commission determinations must exist in the record, an obligation which the commission itself has recognized in its orders." *Tongren v. Public Util. Comm'n,* 85 Ohio St.3d 87, 89–90 (1999). The Commission cannot make a legal determination about whether "any entity resells or redistributes public utility service" without identifying the "entity" and explaining how the *Shroyer* factors apply to "that entity."[28] The basic failure to even explain who or what the Commission is even talking about renders the entire *Shroyer* analysis hopelessly flawed and unsupported.

2. The Order does affirmatively identify the grounds for dismissal.

NEP argued for dismissal based on lack of subject matter jurisdiction and *only* lack of subject matter jurisdiction.[29] The Order, however, dismisses the Complaint for failure to state

[27] *See* Order ¶¶ 64-70.
[28] *See* COI Entry ¶ 4.
[29] Order ¶¶ 13, 43, 44.

reasonable grounds for complaint.[30] The Order fails to explain why the Commission dismissed the Complaint on grounds not asserted. To the extent the Commission claims that it *did* dismiss for lack of subject matter jurisdiction, the Order is clearly erroneous. *See Atwood Resources, Inc. v. Public Util. Comm'n*, 43 Ohio St.3d 96, syllabus ¶ 2 (1989) ("Whether a natural gas producer's activities constitute those of a public utility, whether it has complied with the applicable laws, and whether it should be subject to regulation, are questions that the [Commission] has authority to determine [.]").

As explained in the briefing of the motions to dismiss, lack of jurisdiction and failure to allege reasonable grounds for complaint are entirely different theories with different legal standards—and different implications. See also *In re Complaint of Pilkington N. Am., Inc.*, 2015-Ohio-4797, ¶¶ 23-24, 145 Ohio St. 3d 125, 129 (explaining subject matter jurisdiction). If the Commission does nothing else, it must clarify the grounds for dismissal.

3. The Order does not explain the basis for dismissal of claims that do not assert Respondents are public utilities.

The Complaint alleges 11 counts. Five allege that Respondents are engaged in the business of "public utilities."[31] Four allege that the Respondents are violating the Certified Territory Act or statutes and regulations applicable to "electric service companies."[32] Of the two remaining counts, one is directed to Knox and the other alleges violations of statutes and rules applicable to both public utilities and electric service companies.[33]

[30] Order ¶¶ 1, 91.
[31] Counts I, IV, V, VIII and X.
[32] Counts II, III, VI, and IX.
[33] Counts VII and VIII.

The Order only addresses the counts alleging that Respondents are operating as public utilities. The Order dismisses all counts because "Complainant has failed to set forth reasonable grounds under the *Shroyer* Test." The Order never explains how *Shroyer* can require dismissal of counts that do *not* require a finding that Respondents are providing public utility service. The dismissal of these counts is wholly unexplained, in violation of R.C. 4903.09.

4. The Order does not explain the basis for any finding of "agency."

The Order repeatedly refers to the unidentified Creekside Landlord "and its agents."[34] The basis for any finding that any Respondent is an "agent" of any other is unexplained and unsupported.

Agency may be significant in resolving this case on the merits. Under *Shroyer*, an owner may resell municipal water/sewer service to a tenant. Under *Aquameter*, the owner may employ an agent to perform services for and on the owner's behalf. Agency is a mixed question of law and fact, and the record has not been developed to determine whether NEP provides services for itself or as the "agent" of others. *See, e.g., Hanson v. Kynast*, 24 Ohio St. 3d 171, 174 (1986). There is no record support for any finding that any Respondent is the agent of any other.

5. The Order does not explain the basis of AEP Ohio's alleged "obligation to serve."

The Order grants intervention to AEP Ohio "because it has the exclusive right to provide electric service to customers in its service territory."[35] Two sentences later, the Order makes a seemingly-contradictory statement: "In this case, AEP has an obligation to serve the Reseller within its service territory[.]"[36] AEP Ohio's right to serve is not "exclusive" if AEP is also

[34] Order ¶¶ 64, 65, 70, 75.
[35] Order ¶ 23.
[36] *Id*.

obligated to sell to Resellers. If a customer is receiving service from a Reseller, they are not receiving it from AEP Ohio.

As already explained, the Order renders no factual finding on which (if any) Respondent is a "Reseller." And contrary to having an obligation to serve Resellers, AEP Ohio's tariff expressly forbids reselling in the manner alleged in the Complaint:

> 18. RESALE OF ENERGY Electric service will not be supplied to any party contracting with the Company for electric service (hereinafter in this Section called "Customer") except for use exclusively by (i) the Customer at the premises specified in the service request on contract between the Company and the Customer under which service is supplied and (ii) the occupants and tenants of such premises. *Resale of energy will be permitted only by legitimate electric public utilities subject to the jurisdiction of the Public Utilities Commission of Ohio and only by written consent of the Company*. In addition, resale of energy will be permitted for electric service and related billing as they apply to the resale or redistribution of electrical service from a landlord to a tenant *where the landlord is not operating as a public utility, and the landlord owns the property upon which such resale or redistribution takes place*. (Emphasis added)[37]

AEP Ohio's tariff thus permits the company to serve three categories of consumers: (1) direct customers; (2) "legitimate electric public utilities subject to the jurisdiction of the [Commission]; and (3) property owners who resell to tenants at the owner's property. Moreover, under R.C. 4928.08(E), AEP Ohio may not "knowingly distribute electricity, to a retail consumer in this state, for any supplier of electricity that has not been certified by the commission pursuant to this section."

[37] Ohio Power Company, P.U.C.O. No. 20, Terms and Conditions of Service, 3rd Revised Sheet No. 103-14 (Eff. April 19, 2017).

Here, the Complaint alleges (and documents submitted by none other than NEP prove) that NEP purchases electricity from AEP Ohio; NEP then resells electricity to consumers on property that NEP does not own. To the extent the Order finds that AEP Ohio has an "obligation to serve" NEP in this manner, the Order is plainly mistaken.

6. The Order erroneously imposes new requirements on future complainants.

The Order states, "in future submetering complaints seeking to assert the Relative Price Test, the Commission will require the complainant to provide both an actual bill and the amount she would have paid for the same usage had she been served directly by AEP Ohio."[38]

Ms. Wingo did not "assert" the Relative Price Test. More importantly, the Commission cannot enforce this requirement. Commission orders are only binding on parties to the proceeding. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5789, ¶ 75, 111 Ohio St. 3d 300 ("Collateral estoppel precludes the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."). If the Commission wishes to impose standards of general applicability in future proceedings, it must follow the process and procedures for rulemaking. *See* R.C. 111.15(A)(1).

If a rulemaking is opened, the Commission will have to explain how parties not served by AEP Ohio are supposed to know what they would have paid if they were. The Order cannot claim that this information can be gathered from the websites it ordered utilities to set up because this directive was also unlawful rulemaking.

[38] Order ¶ 75.

III. CONCLUSION

The submetering saga is now entering its fourth year. Three formal complaints have been filed. The Commission has blocked discovery in all three. The COI "investigation" was an ill-conceived and poorly-executed attempt to give the submetering industry a roadmap for avoiding regulation. The Commission continues to block appellate review of prior orders by allowing them to linger in rehearing purgatory. The Commission's ongoing "willful disregard of duty" is obnoxious and outrageous.[39]

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Respectfully submitted,

/s/ Mark A. Whitt

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[39] See *Martin Marietta Magnesia Specialties, L.L.C. v. Public Util. Comm'n*, 2011-Ohio-4189, ¶¶ 19-20, 129 Ohio St. 3d 485 (Commission orders representing "willful disregard of duty" will be reversed).

CERTIFICATE OF SERVICE

This document was filed via the Commission's e-filing system on November 23, 2018. Parties who have subscribed to electronic service will receive notice of this filing from the Commission. Service is also being made this day to the following persons by email:

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Summary: Application for Rehearing electronically filed by Ms. Rebekah J. Glover on behalf of Ms. Cynthia Wingo