BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

NATIONWIDE ENERGY PARTNERS, LLC'S MEMORANDUM CONTRA TO COMPLAINANT'S APPLICATION FOR REHEARING

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I. INTRODUCTION

This Commission should deny Complainant Cynthia Wingo's ("Ms. Wingo") Application for Rehearing of the Commission's Finding and Order of October 24, 2018 (the "Order"). The Commission correctly determined that Ms. Wingo failed to state reasonable grounds because none of the named respondents are jurisdictional public utilities under the Commission's *Shroyer Test.* And because the Complaint raises a threshold jurisdictional question, the Commission appropriately applied the *Shroyer Test* based on the record before it, including the admissions in Ms. Wingo's Complaint, the other pleadings, and the uncontested evidence Nationwide Energy Partners, LLC ("NEP") submitted.

Ms. Wingo does not acknowledge the undisputed facts including her own admission in her complaint that she believes she is paying standard service offer rates for electric generation service (Compl. ¶ 32) and NEP's evidence showing she actually has paid less than a similarly situated residential customer of AEP Ohio for electricity use at her apartment. Instead, she sidesteps the undisputed facts by challenging the Commission's use of the *Shroyer Test* to dismiss her

Complaint. But as the Commission reiterated in the submetering investigation ("COI"),[1] the Commission applies the *Shroyer Test* when resolving complaints involving submetering. Ms. Wingo also questions certain of the Commission's findings and legal conclusions on matters that ultimately prove irrelevant. Yet she does not dispute the controlling, undisputed facts that compel dismissal under the *Shroyer Test.* The Commission should affirm the dismissal of Ms. Wingo's Complaint for failure to state reasonable grounds.

II. ARGUMENT

A. The Commission properly applied the *Shroyer Test* to Ms. Wingo's Complaint.

Ms. Wingo attacks the Commission's use of the *Shroyer Test* to dismiss her Complaint, claiming that "*Shroyer* is not the law" and that the test "bears no relevance to the question of whether reasonable grounds for complaint have been alleged." (Complainant's App. for Rhrg. at 9). Yet the Commission has long recognized that the *Shroyer Test* applies when assessing the Commission's jurisdiction over entities involved in submetering. *See* Case No. 15-1594-AU-COI, Finding and Order at ¶ 16 (Dec. 7, 2016) ("To determine whether an entity is a public utility, the Commission has adopted the *Shroyer Test.*"); *id.* at ¶ 17 ("[T]he Commission has long applied the *Shroyer Test*").

In arguing against the *Shroyer Test*, Ms. Wingo asserts that the test borrows factors from the common law understanding of a "public utility" and that "these common law factors do not control the statutory definition" of a public utility. (Complainant's App. for Rhrg. at 10). But the Commission considered and rejected these same arguments in the COI. There, the Commission observed that the *Shroyer Test* is itself "rooted in" the statutory "public utility" definitions in R.C. 4905.02 and .03 and "was developed as a tool for interpreting [these provisions], on a case-

[1] Case No. 15-1594-AU-COI.

by-case basis." *See* Case No. 15-1594-AU-COI, Second Entry on Rehearing ("COI, Second Entry on Rehearing") at ¶¶ 19, 26 (Jun 21, 2017). Entrusted with oversight of the state's public utilities, the Commission possesses the authority to determine its jurisdiction over an alleged public utility. *Id.* at ¶ 19, citing *Atwood Res. v. Pub. Util. Comm*., 43 Ohio St. 3d 98 ("Atwood is, in fact, a public utility; and, the commission has the authority to make that determination."). And "use of the *Shroyer Test* in determining the Commission's jurisdiction has been expressly upheld by the Supreme Court of Ohio." *Id.* at ¶ 26, citing *Pledger v. Pub. Util. Comm.,* 109 Ohio St.3d 463, ¶ 17, 849 N.E.2d 14.

Ms. Wingo also opposes the Commission's modification of the *Shroyer Test* in the COI through its adoption of the Relative Price Test and Safe Harbors. (Complainant's App. for Rhrg. at 11-12). But the Commission's modified *Shroyer Test* resulted from an investigation authorized by R.C. 4905.26 involving input from relevant stakeholders, including jurisdictional utilities, landlords and at least one condominium owner. As for Ms. Wingo's claims that the COI amounts to an unenforceable advisory opinion or unlawful rule-making, the Commission already disposed of those arguments. *See* COI, Second Entry on Rehearing at ¶ 14 ("We do not agree that the December 7, 2016 Order is an improper advisory opinion. Rather, our investigation…allowed a forum for stakeholder input and an opportunity to consider modifications to the *Shroyer Test* before we consider the evidence to be proffered in the Whitt Complaint Case."); *id.* at ¶ 13 ("[The COI Case…is authorized under R.C. 4905.26, and has not resulted in the promulgation of any rules.").

More importantly, regardless of whether *Shroyer* is the appropriate test to apply, the Commission's dismissal of Ms. Wingo's Complaint accords with nearly a century of Ohio Supreme Court precedent holding that a landlord is not a jurisdictional public utility and that a

tenant is not the "consumer" entitled to assert this Commission's jurisdiction. *See Jonas v. Swetland Co.*, 119 Ohio St. 12 (1928); *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1, 4, 208 N.E.2d 923 (1965); *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847 (tenant not the ultimate consumer when landlord secures, resells and redistributes electric service to its tenants); *Pledger*, 109 Ohio St. 3d at ¶ 36 ("The PUCO's position that the landlord is the 'consumer' under R.C. 4905.03(A)(8) is better reasoned and is supported by legal authority."). Ms. Wingo's claim that the Commission misapplied Ohio law in dismissing her Complaint lacks merit.

B. The Commission did not have to provide Ms. Wingo with discovery or a hearing before applying the *Shroyer Test* to conclude that she failed to state reasonable grounds against non-jurisdictional respondents.

Nor is there merit to Ms. Wingo's assertion that the Commission prematurely dismissed her Complaint for failure to state reasonable grounds against respondents over whom the Commission lacks subject matter jurisdiction. (Complainant's App. for Rhrg. at 6-7). She claims that she satisfied the "reasonable grounds" standard in R.C. 4905.26 and is entitled to discovery and a hearing. (*Id.* at 6) But she ignores the lead-in sentence to R.C. 4905.26, which provides that the statute pertains to complaints "*against any public utility*" (emphasis added). In other words, *regardless of a complaint's underlying allegations*, a complaint fails to state reasonable grounds under R.C. 4905.26 where the respondents are not "public utilities" subject to the Commission's jurisdiction. And here, the Commission tied Ms. Wingo's failure to establish reasonable grounds under R.C. 4905.26 to the fact that the Commission lacked jurisdiction over the submetering

arrangements at Creekside:[2]

> As we have found above that no resale or redistribution of natural gas service has occurred under the facts in this case, and that the provision of electric, water, and sewer services at Creekside are not subject to this Commission's jurisdiction under the *Shroyer* Test, we conclude that reasonable grounds for this Complaint have not been stated.

(Order at ¶ 79) (emphasis added).

Having determined that the respondents were not jurisdictional public utilities under the *Shroyer Test*, the Commission necessarily concluded that Ms. Wingo failed to state reasonable grounds for her Complaint. The Commission therefore did not need to wade fruitlessly through discovery and a hearing before dismissing the Complaint.

None of the authorities that Ms. Wingo cites in asserting that her right to discovery and hearing were "unlawfully denied" address the *Shroyer Test* or involve a question of the Commission's subject matter jurisdiction.[3] Moreover, Ms. Wingo fails to mention the many Commission and Supreme Court of Ohio decisions recognizing the Commission's authority to apply the *Shroyer Test* to resolve its subject matter jurisdiction through a motion to dismiss without first requiring discovery or a hearing.[4] *See also In the Matter of the Complaint of Toledo Premium*

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[2] For that reason, Ms. Wingo is also wrong in claiming that "[t]he Commission never determined, one way or the other, whether the Complaint alleges reasonable grounds to consider the issue raised" (Complainant's App. for Rhrg. at 5) or that the Order "does not affirmatively identify the grounds for dismissal." (*Id.* at 16). As the quote above demonstrates, the Commission expressly determined that the Complaint failed to state reasonable grounds due to lack of jurisdiction.

[3] *See W. Res. Transit Auth. v. Pub. Util. Com.*, 39 Ohio St.2d 16, 313 N.E.2d 811 (1974) (involving complaint against a regulated public utility, i.e., a motor transportation company "certified by the commission to transport persons…."); *Ohio Bell Tel. Co. v. Pub. Util. Com*, 64 Ohio St.3d 145, 593 N.E.2d 286 (1992) (involving appeal by public utilities, i.e., regulated telephone companies, where Commission effected a change in utility rates without a hearing).

[4] *In the Matter of the Complaint of Michael E. Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS, Entry (Mar. 16, 1995); *In the Matter of the Complaint of Nader v. Colony Square Partners, Ltd.*, Case No. 99-475-EL-CSS, Entry (Aug. 26, 1999). *In the Matter of the Complaint of 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.

Yogurt, Inc. dba Freshens Yogurt v. Toledo Edison Co., et al., Case No. 91-1529-EL-CSS, Entry (Sept. 17, 1992) (applying *Shroyer,* denying motion to compel discovery against landlords, and dismissing complaint against landlords for lack of jurisdiction).

The Commission thus rightly noted that "[t]he pleadings and admissions by the parties may be sufficient to determine if reasonable grounds for the complaint exist." (Order at ¶ 84, citing *Stephens v. Pub. Util. Comm.*, 102 Ohio St.3d 44, 2004-Ohio-1798, 806 N.E.2d 527). Moreover, when resolving its jurisdiction, the Commission is not limited to the pleadings, and may consider "any pertinent evidentiary materials." *Brooks*, Case No. 94-1987-EL-CSS, Entry at ¶ 7.

Here, the materials that the Commission considered—the pleadings and NEP's undisputed evidence—conclusively established that none of the respondents were jurisdictional public utilities. Any further discovery or hearing would have been futile.

C. The pleadings and NEP's undisputed evidence compel the Commission's determination that Respondents are not public utilities under the *Shroyer Test.*

While Ms. Wingo asserts that the "Order does not engage in the fact-finding necessary to apply [the *Shroyer Test*],"[5] the Commission made specific findings that the pleadings and NEP's undisputed evidence warrant dismissal of her Complaint under all three elements of the *Shroyer Test*. The Commission's fact findings include the following:

- **As for natural gas service**, the Commission found that respondent Knox Energy Cooperative Association, Inc. ("Knox") is a nonprofit cooperative association and the sole provider of natural gas distribution at Creekside, and that Knox provides such services directly through its own lines and meters. (Order at ¶ 54). In making this finding, the Commission relied on Knox's Answer, and the fact that "Complainant has failed to dispute Knox's assertions or provide other evidence." (*Id.* at ¶¶ 55-56). Because Knox did not engage in resale or redistribution of natural gas, the *Shroyer Test* did not apply to the provision of gas to Creekside. (*Id.* at ¶ 56). And because Knox is a nonprofit cooperative, Knox falls outside the Commission's subject matter jurisdiction. (*Id.*).

[5] Complainant's App. for Rhrg. at 14.

The Commission then applied the *Shroyer Test* to the provision of water, sewer and electric service at Creekside and determined that none of the respondents were jurisdictional public utilities under the test:

- **As for the first prong of the *Shroyer Test,*** respondents NEP, Crawford Hoying, Ltd., and Crawford Communities, LLC (collectively, Crawford Hoying, Ltd., and Crawford Communities, LLC are the "Crawford Parties") did not hold a franchised territory or certificate of authority, or availed themselves of special benefits available to public utilities. (Order at ¶¶ 64, 68). Not only did Ms. Wingo never assert that the Crawford Parties specifically sell utility services or avail themselves of any special benefits available to public utilities, but the Crawford Parties expressly denied doing so. (Order at ¶ 65). As to NEP, the Commission's finding is supported by the evidence NEP submitted. (*Id.*). Moreover, Ms. Wingo admitted that none of the respondents have certificates of public convenience and necessity to provide water and sewer services or a certified territory or authority to provide electric service. (Order at ¶ 36).

- **As to the second prong of the *Shroyer Test,*** the Commission found that the respondents did not make water, sewer, and electric service available to the general public. (Order at ¶¶ 65, 68). The Commission noted that the Crawford Parties denied providing utility services to the general public (Order at ¶ 65), nor did Ms. Wingo even allege otherwise. As for NEP, the Commission found that "NEP provided credible, uncontested evidence that it only provides services on a contract basis to property owners, managers, and developers, not to the general public" (Order at ¶ 65) (emphasis added). And Ms. Wingo "failed to provide any evidence to the contrary." (*Id.*) (emphasis added).

- **As to the third prong of the *Shroyer Test,*** the Commission found that any provision of water and sewer service was ancillary to the primary business of Creekside Acquisition Columbus Associates II, LLC ("CAC"), Creekside's landlord. (Order at ¶ 66). Among other things, the Commission looked to NEP's evidence that CAC passes through water/sewer charges to its tenants. (*Id.*). As for NEP, the Commission determined that its activities were similar to the activities in *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14 and in *Dumuney v. Aquameter, Inc.*, Case No. 96-397-WW-CSS, Opinion and Order (Jan. 4. 2001). (Order at ¶ 63).

The Commission was also able to make a comparison of this case to *Pledger* and *Aquameter* given the undisputed evidence submitted by NEP, including that (i) CAC, not NEP, receives water and sewer services from the City of Reynoldsburg; (ii) NEP provides meter reading, repair, billing and payment services to CAC relating to water use, and that its only interaction with the City of Reynoldsburg is to receive and pay on CAC's behalf the City's invoices to CAC; and

(iii) that NEP does not own any utility infrastructure or take title to any commodity. (Order at ¶¶ 46-47).

- **As to the third prong of the *Shroyer Test* as to electric service,** the Commission relied on evidence to find that the provision of electric service was ancillary to CAC's and NEP's primary business under the Safe Harbor. (Order at ¶ 78). Specifically, the Commission looked to unrebutted evidence submitted by NEP—sworn testimony, bills and calculations of five monthly billing periods—demonstrating that NEP's invoices to Ms. Wingo were less than AEP Ohio's default service tariff charges on an annualized basis. (Order at ¶ 77).

Ms. Wingo cannot credibly dispute these findings by claiming the Commission precluded her from challenging the evidence submitted by NEP. For one, Ms. Wingo **admitted in her Complaint that she believes she is paying standard service offer rates** for electric generation service. (Compl. ¶ 32). Moreover, while Ms. Wingo opposed NEP's motion to dismiss, she never purported to dispute NEP's evidence, including NEP's evidence that it satisfied the Safe Harbor. Nothing prevented her from doing so. For example, when making its comparison under the Safe Harbor, NEP looked to Ms. Wingo's bills and the publicly-available AEP Ohio online bill calculator. (*See* NEP's Motion to Dismiss, Exhibit 2; Affidavit of John Calhoun, ¶ 19). All of this information was and is available to Ms. Wingo.

Ms. Wingo attacks several other Commission fact-findings, but none bear on the Commission's resolution of the *Shroyer Test.* She asserts that the Commission did not resolve a purported factual dispute over the owner/landlord of Creekside,[6] yet she does not explain *why* resolving that issue bears on applying the *Shroyer Test* to either NEP or the Crawford Parties (who, aside from Knox, are the only other named respondents to the Complaint). Ms. Wingo also objects that the Commission never made affirmative findings that NEP, the Crawford Parties or CAC are "resellers." (Complainant's App. for Rhrg. at 6-7). Yet Ms. Wingo's Complaint alleges that *all*

[6] Complainant's App. for Rhrg. at 2.

the named respondents in her Complaint are "resellers." (Compl. at ¶ 8). While NEP denies that it is a reseller of utility services, even taking Ms. Wingo's allegation that all the respondents are resellers as true, the Commission's analysis under the *Shroyer* test would not differ.

Similarly, while Ms. Wingo disputes the basis for the Commission's finding that NEP and the Crawford Parties were "agents" of Creekside's landlord, applying the *Shroyer Test* does not depend on the existence of an agency-principal relationship. Rather, these respondents are not jurisdictional public utilities under the *Shroyer Test* because none of them fall within the test's three prongs—regardless of any agency-principal relationship.

In sum, the pleadings and NEP's evidence amply support the Commission's factual and legal determinations that NEP and the other respondents are not jurisdictional public utilities under the *Shroyer Test.*

D. The Commission appropriately dismissed the Complaint in its entirety.

Applying the *Shroyer Test*, the Commission determined that none of the respondents are jurisdictional public utilities and dismissed the Complaint in its entirety. But Ms. Wingo asserts that several counts in her Complaint—Count II, III, VI, IX, X and XI—did not depend on a respondent's public utility status. She is mistaken. The Commission's resolution of the *Shroyer Test* determines the entire Complaint.

Count II alleges NEP provides "retail electric service" to *Ms. Wingo* by billing her for generation service in violation of R.C. 4928.08(B), which restricts the provision "of a competitive retail electric service to a *consumer* in this state…." (emphasis added). But none of the respondents (including NEP) are jurisdictional public utilities, and so Ms. Wingo is not a "consumer" of any retail electric generation service. *See FirstEnergy Corp. v. Pub. Util. Com.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485 (finding that the landlord is the consumer and rejecting claim

that tenants of submetered office buildings, apartment complexes, and shopping centers are "ultimate consumers" of electric service under Chapter 4928). Moreover, because Ms. Wingo is not the consumer of any alleged retail electric service, she cannot demonstrate the particularized harm necessary to maintain her claim. *See Buckeye Energy Brokers, Inc, v. Palmer Energy Co.*, 139 Ohio St.3d 284, 2014-Ohio-1532, 11 N.E.3d 1126.

Count III alleges that the respondents are violating the Certified Territory Act. This claim, however, rests on Ms. Wingo's allegation that the respondents are "electric suppliers" that are "supplying or arranging for the supply of retail electric service to Creekside" (Compl. at ¶ 76).). But an "electric supplier" under the Certified Territory Act is defined as an "electric light company as defined in section 4905.03 of the Revised Code…" R.C. 4933.81(A). Without a threshold finding that a given entity is a public utility "electric light company" under the *Shroyer Test,* an entity cannot be an "electric supplier" under the Certified Territory Act.

Counts VI, IX, X and XI likewise assume a respondent's jurisdictional public utility status. Counts VI and IX pertain to rules governing competitive retail electric service providers. But none of the respondents are providing any retail competitive electric service to Ms. Wingo. Nor can she be a "consumer" of such electric service. *See FirstEnergy Corp., supra.* Count X concerns Knox, a non-jurisdictional nonprofit cooperative. And Count XI alleges various statutory violations, all of which turn on the respondents first being a jurisdictional public utility, which they are not.

E. Ms. Wingo's remaining grounds for rehearing lack merit.

The other issues Ms. Wingo raises also lack merit. She objects to the Commission's observation, at paragraph 23 of the Order, that "AEP has an obligation to serve the Reseller within its service territory." (Complainant's App. for Rhrg. at 18). But the Commission merely restated well-established law that a landlord who resells utility services to its tenant is still the consumer

of the jurisdictional public utility. *E.g., Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1 208 N.E.2d 923 (1965). And the jurisdictional utility is obligated to serve that consumer, notwithstanding resale to a tenant. *Brooks*, Case No. 94-1987-EL-CSS, Entry at ¶ 7 (finding utility's resale tariff provision unreasonable and unenforceable); *Firstenergy Corp.* at ¶ 9 ("S.B. 3 did not change the law governing the resale or redistribution of electric service by a landlord to its tenants, and nothing in S.B. 3 overrules *Jonas*, *Shopping Centers Assn.*, or the Commission's decision in *Brooks* (which relied on *Shopping Centers Assn.*).").

Lastly, Ms. Wingo claims the Commission overstepped its bounds by observing that 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." (Order at ¶ 75). First, Ms. Wingo never explains how the Commission's decision to clarify the pleading requirements in <u>future</u> *Shroyer Test* cases harms her in this case. In fact, the Commission *exempted* Ms. Wingo's Complaint from that requirement. (*Id.*) ("[W]e will accept Complainant's unsupported allegation…and conclude that Complainant has met the Relative Price Test."). In any event, the Commission has the authority to determine its own jurisdiction through the *Shroyer Test. Atwood Res., supra; Pledger, supra.* And in doing so, it may require that future complainants submit certain evidence demonstrating they satisfy the Relative Price Test. Nor does the Commission's statement foreclose any future rulemaking should the Commission choose to do so.

III. CONCLUSION

The Commission should deny Ms. Wingo's application for rehearing for the reasons set forth above.

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 3rd day of December 2018 upon the persons listed below.

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Summary: Memorandum Contra to Complainant's Application for Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Nationwide Energy Partners, LLC