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FILE

IN THE SUPREME COURT OF OHIO

Cynthia Wingo,	:	
	:	
Appellant,	:	Case No. 19-0273
	:	
v.	:	Appeal from the Public Utilities Commission of Ohio
	:	
The Public Utilities Commission of Ohio,	:	
	:	Public Utilities Commission of Ohio
Appellee.	:	Case No. 17-2002-EL-CSS

NOTICE OF APPEAL OF CYNTHIA WINGO

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Notice of Appeal of Cynthia Wingo

Appellant Cynthia Wingo is the Complainant in Case No. 17-2002-EL-CSS before the Public Utilities Commission of Ohio. On October 24, 2018, the Commission issued a Finding and Order dismissing the Complaint. (Attachment A.) Appellant hereby provides notice of appeal of the October 24, 2018 Finding and Order, in accordance with R.C. 4903.11, 4903.12, 4903.13, and S.Ct.Prac.R. 10.02(A).

The Complaint alleges that the Respondents, individually or collectively, are unlawfully engaged in the business of a "public utility" or, alternatively, as providers of one or more service components of "competitive retail electric service." *See* R.C. 4905.02, 4905.03, 4928.01(A)(4). As set forth in Appellant's application for rehearing of November 23, 2018, the Commission's order dismissing the Complaint 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.

On December 19, 2018, the Commission issued an Entry on Rehearing purporting to "grant" rehearing "for further consideration of the matters specified." (*See* Attachment B at ¶ 1.) Because the December 19, 2018 Entry on Rehearing does not grant or deny rehearing of any matter specified in the application for rehearing, rehearing was denied by operation of law as of December 23, 2018. R.C. 4903.10(B).

On January 18, 2019, Appellant filed a second application for rehearing to perfect her right to appeal the Commission's general practice of "granting" rehearing for purpose of further consideration. As set forth in the second application for rehearing:

1. Upon the filing of an application for rehearing, the Commission has 30 days to "grant and hold such rehearing on the matter specified in such application." R.C. 4903.10. If the Commission does not "grant or deny such application" within 30 days of filing, "it is denied by operation of law." *Id.* An order purporting to grant rehearing "for further consideration of the matters specified" is insufficient to invoke the Commission's rehearing jurisdiction.

2. R.C. 4903.10, 4903.11, and 4903.12 preclude the Commission from exercising jurisdiction on rehearing where the application for rehearing has been denied by operation of law.

3. Because Complainant's November 23, 2018 application for rehearing has been denied by operation of law, the Supreme Court of Ohio has exclusive jurisdiction to review the Commission's October [24], 2018 dismissal order.[1]

On February 6, 2019, the Commission issued a Second Entry on Rehearing denying all previous applications for rehearing. (*See* Attachment C.)

Appellant respectfully requests an order from this Court finding that the Commission's October 24, 2018 Finding and Order is unreasonable and unlawful; that the application for rehearing of November 23, 2018 was denied by operation of law as of December 23, 2018; and granting all other necessary and proper relief.

Respectfully submitted,

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[1] The second application for rehearing erroneously referred to the date of the dismissal order as October 22, 2018.

CERTIFICATE OF FILING

I hereby certify that, in accordance with S.Ct.Prac.R. 3.11(D)(2), the foregoing Notice of Appeal has been filed with the Docketing Division of the Public Utilities Commission of Ohio by leaving a copy at the office of the Commission in Columbus, Ohio, in accordance with Ohio Adm. Code 4901-1-02(A) and 4901-1-36, on February 21, 2019.

/s Mark A. Whitt
Mark A. Whitt
Counsel for Appellant
Cynthia Wingo

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Cynthia Wingo was served upon the parties of record to the proceeding before the Public Utilities Commission of Ohio listed below and pursuant to S.Ct.Prac.R. 3.11(B)(2) and 3.11(D)(1)(a) and R.C. 4903.13 on February 21, 2019, via electronic transmission, hand delivery or first class U.S. mail, postage prepaid.

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ATTACHMENT A

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
CYNTHIA WINGO,

COMPLAINANT,

V. CASE NO. 17-2002-EL-CSS

NATIONWIDE ENERGY PARTNERS, LLC,
ET AL.

RESPONDENTS.

FINDING AND ORDER

Entered in the Journal on October 24, 2018

I. SUMMARY

{¶ 1} The Commission finds that the Complaint filed on September 19, 2017, should be dismissed for failure to state reasonable grounds as required by R.C. 4905.26.

II. APPLICABLE LAW

{¶ 2} Pursuant to R.C. 4905.26, the Commission has authority to consider a written complaint against a public utility by any person or corporation regarding any rate, service, regulation, or practice affecting or relating to any service furnished by that public utility that is unreasonable, unjust, insufficient, or unjustly discriminatory or preferential.

{¶ 3} The Commission's three-part test, now known as the *Shroyer* Test, for determining whether a mobile home park owner that was reselling submetered municipal water service was acting as a public utility and was, therefore, subject to this Commission's jurisdiction, was established in *In re Inscho, et al. v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) at 2, 4-6:

> (1) Has the landlord manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate

of public convenience and necessity, the use of eminent domain, or use of the public right-of-way for utility purposes?

(2) Is the utility service available to the general public rather than just to tenants?

(3) Is the provision of utility service ancillary to the landlord's primary business?

{¶ 4} The Commission's use of the *Shroyer* Test was affirmed as reasonable by the Supreme Court of Ohio in *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, at ¶18. In addition to waterworks companies, the *Shroyer* Test has been applied to the provision of electric utility service. See, *In re Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987-EL-ATA, Opinion and Order (May 8, 1996); *In re FirstEnergy Corp.*, Case No. 99-1212-EL-ETP, et al., Entry (Nov. 21, 2000); *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶10, 18.

{¶ 5} On December 7, 2016, the Commission issued a Finding and Order *in re the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI (*Submetering Investigation*), which clarified that failure of any one of the three prongs of the *Shroyer* Test is sufficient to demonstrate that an entity is unlawfully operating as a public utility, and established a "Rebuttable Presumption" and "Relative Price Test." *Submetering Investigation*, Finding and Order (Dec. 7, 2016) at ¶¶ 1, 16 (*Dec. 7, 2016 COI Order*). Under this analysis, the provision of residential submetered utility service would be presumed to be not ancillary to the landlord's primary business where the landlord charges more than the total bill for a similarly-situated customer served by the applicable utility's standard service offer. The landlord would still be provided an opportunity to overcome the Rebuttable Presumption by presenting evidence that its provision of utility service was, in fact, ancillary to the landlord's primary business. *Dec. 7, 2016 COI Order* at ¶¶ 18-20, 22.

{¶ 6} On June 21, 2017, the Commission issued a Second Entry on Rehearing in the *Submetering Investigation* docket (*Jun. 21, 2017 COI Entry*), adopting the use of the Rebuttable Presumption and Relative Price Test to determine, on a case-by-case basis, whether a company which resells or redistributes a public utility service to a submetered residential customer (Reseller) should be subject to this Commission's jurisdiction under the third prong of the *Shroyer* Test. The *Jun. 21, 2017 COI Entry* also determined that the Reseller should not be allowed to charge any amount over the applicable utility's standard service offer without triggering the Rebuttable Presumption. Under this analysis, a Reseller of submetered service to a residential customer will be presumed to be acting as a public utility under the third prong of the *Shroyer* Test if the Reseller is charging more than the resident would have been charged if the resident were taking service directly under the public utility's default service tariff. However, the *Jun. 21, 2017 COI Entry* also adopted two Safe Harbor exceptions by which the Reseller can overcome the Rebuttable Presumption: (1) the Reseller is simply passing through its annual costs of providing a utility service charged by the public utility (and generation charges from a competitive retail service provider, if applicable) to submetered residents at a given premises; or (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. *Jun. 21, 2017 COI Entry* at ¶¶ 40, 49-50.

III. PROCEDURAL HISTORY

{¶ 7} The Complaint in this proceeding was filed on December 15, 2016 by Cynthia Wingo (Complainant or Ms. Wingo) against NEP, Crawford Hoying, Ltd. and Crawford Communities, LLC, and Knox Energy Cooperative Association, Inc. (Knox). According to the Complaint in this docket, Ms. Wingo is a residential tenant at the Creekside at Taylor Square apartments (Creekside) in Reynoldsburg, Ohio, for which NEP supplies, or arranges for the supply of, electric, water, and sewer service to Creekside residents. The Complainant further asserts that Crawford Hoying, Ltd. was the developer of the Creekside apartments,

and that Crawford Communities, LLC is listed as "Agent for Landlord" on Complainant's lease for her apartment. The Complainant also avers that Knox is a non-profit corporation providing natural gas service to both member and non-member Creekside residents, but that the Complainant is not a member of Knox. The Complaint further asserts that each Respondent, either individually or in concert with one or more other Respondent(s), is a "Reseller" of public utility services as defined in the *Jun. 21, 2017 COI Entry* at ¶¶ 4, 16-17, over which the Commission has asserted personal and subject matter jurisdiction.

{¶ 8} On September 29, 2017, the Ohio Power Company (AEP Ohio or EDU) filed a motion to intervene, pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11, noting that the Complainant alleges that NEP has unlawfully provided electric service to an electric load center within AEP Ohio's certified territory in violation of R.C. 4933.83(A).

{¶ 9} On October 10, 2017, answers were filed by NEP, Knox, and jointly by Crawford Hoying, Ltd. and Crawford Communities, LLC (jointly Crawford Hoying). As discussed more fully below, NEP admits that in June 2017, Complainant began renting an apartment at Creekside where NEP bills the residents for electric, water, and common area charges, and that NEP provides commercial metering, billing, and collection services to the owner of Creekside. NEP admits that it is not certified by this Commission as a supplier of competitive retail electric service, but denies that it provides jurisdictional public utility services at Creekside, that it is a supplier, or is required to be certified as a supplier of competitive retail electric service under R.C. 4928.08(B).

{¶ 10} In its answer, Knox states that it is a domestic non-profit corporation that provides natural gas service only to its members, but denies that the Complainant is not a member of Knox, and that Knox has any relationship with NEP. Knox asserts that, as a non-profit provider of natural gas service under R.C. 4905.02(A)(2), the Commission has no jurisdiction over its rates and charges for natural gas service. Further, as natural gas service is the only form of utility service that Knox provides, Knox denies any allegations that do not apply to the provision of natural gas service.

{¶ 11} In their joint answer, Crawford Hoying requests that the Commission dismiss this case until the Commission's *Submetering Investigation* has been completed, and the Joint Committee on Agency Rule Review (JCARR) has approved any new rules or rule modifications proposed by the Commission. Crawford Hoying does, however, admit that the Complainant signed a lease in June 2017 that identifies Crawford Communities, LLC, as the management agent at Creekside, but Crawford Hoying denies that Crawford Communities, LLC is still the landlord at Creekside. Crawford Hoying generally denies most of the allegations in the Complaint, and asserts various affirmative defenses including lack of reasonable grounds, personal and subject matter jurisdiction, standing, and estoppel by acquiescence.

{¶ 12} On October 16, 2017, NEP filed a memorandum contra AEP Ohio's motion to intervene. On October 20, 2017, AEP Ohio filed a reply to NEP's memorandum contra its intervention.

{¶ 13} On November 7, 2017, NEP filed a motion to dismiss the Complaint for lack of jurisdiction, which will be more fully discussed below.

{¶ 14} On November 15, 2017, Knox filed a motion to sever Count X of the Complaint, relating to the provision of natural gas service by Knox at Creekside, into a separate docket. No memoranda contra were filed with respect to this motion.

{¶ 15} On November 16, 2017, the Complainant filed a memorandum contra NEP's motion to dismiss the Complaint.[1] Ms. Wingo asserts that there are reasonable grounds for complaint under R.C. 4905.26, which preclude summary dismissal. On November 17, 2017, AEP Ohio also filed a memorandum contra NEP's motion to dismiss the Complaint. On November 24, 2017, NEP filed a reply to the memoranda contra of both Ms. Wingo and of

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1 The Complainant's memorandum contra incorporates by reference her October 27, 2017 memorandum contra NEP's motion to dismiss her first complaint in *In re Wingo v. Nationwide Energy Partners, LLC*, Case No. 16-2401-EL-CSS (*Wingo 1*)

AEP Ohio regarding NEP's motion to dismiss the Complaint. These pleadings will be considered more fully below.

{¶ 16} On December 8, 2017, Crawford Hoying also filed a motion to dismiss the Complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. On December 26, 2017, Ms. Wingo filed a memorandum contra Crawford Hoying's motion to dismiss the Complaint. Crawford Hoying then filed a reply to the Complainant's memorandum contra on January 2, 2018.

{¶ 17} Finally, on January 9, 2018, the Complainant filed a notice to depose NEP's Account Manager, John Calhoun; and on January 26, 2018, NEP filed a motion for protective order or to stay discovery pending a ruling on NEP's motion to dismiss. Ms. Wingo filed a memorandum contra on February 12, 2018, and NEP filed a reply to Complainant's memorandum contra on February 20, 2018.

IV. AEP OHIO'S MOTION TO INTERVENE

{¶ 18} As noted above, AEP Ohio has moved to intervene in this proceeding, pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11, as the Complainant alleges that NEP has unlawfully provided electric service to an electric load center within AEP Ohio's certified territory in violation of R.C. 4933.83(A).

{¶ 19} NEP concedes that Creekside is within AEP Ohio's certified territory, but objects to the EDU's intervention, arguing that this proceeding will not determine or change the scope of AEP Ohio's certified territory rights as neither the Complainant nor NEP dispute that Creekside is located within AEP Ohio's certified territory. NEP argues that AEP Ohio's interest within the Creekside complex will only arise if the property converts from a master-metered complex back to a utility-metered complex, but contends that such an event is not an issue in this proceeding.

{¶ 20} In its reply, AEP Ohio argues that the Commission's decision in this case will directly affect AEP Ohio's present interests and business operations because it will impact

the type of service that AEP Ohio will provide to multi-resident buildings in its territory. AEP Ohio notes that it was granted intervention in *In re Whitt v. Nationwide Energy Partners, LLC*, Case No. 15-697-EL-CSS (*Whitt Complaint*), holding that AEP Ohio's intervention would significantly contribute to the full development and equitable resolution of that proceeding and any determination regarding the scope of the Commission's jurisdiction could also impact the extent of AEP Ohio's service territory. *Whitt Complaint*, Entry (Nov. 18, 2015) at 6-7.

{¶ 21} NEP counters AEP Ohio's argument by noting that this Commission has repeatedly ruled that an interest in the broad policy and precedential value of a case does not establish grounds for intervention. *Whitt Complaint*, Entry (Nov. 18, 2015) at 5, citing *In re City of Cleveland, et al. v. Cleveland Electric Illuminating Co.*, Case No. 01-174-EL-CSS, Entry (Mar. 29, 2001) at 4, and *In re Ohio Schools Council, et al. v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry (Sep. 4, 2014) at 3-4.

{¶ 22} R.C. 4903.221 provides that any person who may be adversely affected by a Commission proceeding may intervene in such proceeding, while R.C. 4903.221(B) and Ohio Adm.Code 4901-1-11 list four criteria for the Commission to consider in ruling upon a motion to intervene:

> (1) The nature and extent of the prospective intervenor's interest;
>
> (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
>
> (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; and,
>
> (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

{¶ 23} AEP Ohio has a real and direct interest in this proceeding, not because of an interest in broad policy or the precedential value of this case, but because it has the exclusive right to provide electric service to customers in its service territory. Additionally, AEP Ohio's intervention will not unduly prolong or delay the proceedings and the EDU's participation will significantly contribute to the full development and equitable resolution of the factual issues in this proceeding. In this case, AEP Ohio has an obligation to serve the Reseller within its service territory and its intervention meets each of the four statutory criteria set forth above. Accordingly, AEP Ohio's motion to intervene will be granted.

V. SUMMARY OF THE PLEADINGS

A. *The Complaint*

{¶ 24} The Complaint sets forth eleven separate counts over more than 100 paragraphs regarding submetered utility services at her residence. According to the Complaint, Ms. Wingo has been renting an apartment at Creekside where NEP, Knox, and Crawford Hoying provide metering, billing, and collection services for the use of electric, water, and sewer services, as well as for usage in common areas, under the Utility Addendum that is part of the Lease Agreement between Crawford Communities, LLC as landlord and management agent, and Ms. Wingo as tenant, for the period of June 5, 2017 through September 1, 2018 (Complaint at ¶¶ 55-57, Ex. 1 at 3, 36).

{¶ 25} The Complaint further asserts that since at least 2000, NEP has offered direct cash payments, monthly residual payments, services in lieu of payment, and other financial incentives to lure developers and owners of multifamily properties into allowing NEP to install, operate and maintain utility meters and infrastructure at participating developers' properties, and to individually bill and collect for utility services from residents. The Complainant alleges that after NEP and the developer agree on how much the developer should be paid, the developer and NEP execute a commodity coordination service agreement (CCSA) prepared by NEP, for the supply of electric, gas, water and/or sewer service. Complainant asserts that the CCSAs contain provisions requiring the developer to

include language in tenant leases and condominium declarations purporting to give NEP the right to evict tenants, place liens on condominium units, and pursue other recourse against tenants and residents for non-payment of utility bills (Complaint at ¶¶ 12-14).

{¶ 26} Complainant contends that the CCSAs are agreements intended to mask the true nature of NEP's services and its relationship among the developer, residents, and tenants. To the extent the CCSAs purport to establish an agency relationship between NEP and the developer, the Complainant states that such agency relationship is not disclosed to Creekside tenants or residents. The Complaint further declares that NEP and each of the other Respondents are parties to, or beneficiaries of, one or more CCSAs, and that if the Commission does find that NEP has acted or is acting as an agent of any other Respondent, such Respondent, as NEP's principal, is liable for the acts and omissions of NEP (*Id.* at ¶¶ 15-17).

{¶ 27} The Complaint further asserts that NEP arranges for the supply of public utility services to the property identified in the CCSA by establishing commercial accounts for electric, gas, water and/or sewer service with a municipal or regulated public utility authorized to serve the geographic area, and that NEP creates the account under the name of the developer, but directs the public utility to send its bills directly to NEP. In addition, Complainant professes that in some instances, NEP enters into contracts with competitive retail electric suppliers (CRES) to procure electricity for the multifamily properties identified in the CCSA, and that NEP also contracts to aggregate the electric loads of multiple properties (*Id.* at ¶¶ 18-19).

{¶ 28} Without specifically naming parties, the Complaint further declares that the developers who execute CCSAs do not disclose their relationship with NEP, or otherwise disclose to prospective tenants or purchasers that they will receive utility services, or bills for such services, from NEP. Nor do the leases or condominium declarations applicable to properties served by NEP disclose any material terms and conditions of utility services, such

as rates, security deposits, late fees, payment methods, or other pertinent information, according to the Complainant (*Id.* at ¶ 20).

{¶ 29} The Complaint next asserts that tenants and residents of communities served by NEP are not permitted to shop for an electric supplier, or enter direct relationships with a public utility, according to the Complainant. The Complainant then alleges that NEP claims to bill residents at the residential rate charged by the public utility, and that NEP retains all funds collected from residents. She denies that residents pay the same delivery and supply rate they would otherwise pay to the public utility, but argues that even if NEP did charge the same as the utility, NEP does not offer equivalent services. As examples, the Complainant cites energy efficiency measures or rebates, percentage of income payment (PIPP) and other low-income and emergency assistance programs, alternatives to cash security deposits, and net metering or "smart" meters as programs offered by the public utility not available through NEP. The Complainant asserts that NEP earns profits that exceed the profits of the public utility since the utility's rates reflect the costs in providing PIPP and the other above referenced programs, as well as public utility taxes, but are not paid by NEP (*Id.* at ¶¶ 21-25).

{¶ 30} The Complainant next alleges that residents receive fewer benefits than they would if served directly by the public utility, since the utility's customers can receive assistance from the Commission's Staff in resolving disputes and through formal complaint proceedings. Ms. Wingo asserts that when consumers call the Commission for assistance in dealing with NEP or another utility reseller, they are routinely told that the Commission is unable to offer assistance or provide a forum for a complaint. The Complainant also contends that NEP's $50 charge for meter tests, ten percent late charge on unpaid balances, and lack of interest paid on security deposits are excessive when compared with AEP Ohio's practices (*Id.* at ¶¶ 25-27).

{¶ 31} With respect to common area charges, the Complainant alleges that NEP does not meter common area usage, but bills residents for common area charges by subtracting

funds received from tenants and residents from the amounts billed to NEP by the public utility. This amount is then billed to tenants and residents as common area usage, either directly on residents' and tenants' bills, or indirectly through a separate bill issued to a homeowner's association, which is ultimately paid by residents through homeowner association dues. The Complainant contends that NEP's method of calculating common area charges results in tenants and residents paying more for utility services than if directly served by the public utility, since electric distribution losses, unaccounted-for water, tenant and resident vacancies, uncollectible expenses, and other costs ordinarily incurred by the public utility, and built into the utility's rates, are shifted from NEP to tenants and residents, who pay such costs twice: once through the public utility rate structure applied by NEP, and again through common area charges. Further, the Complaint notes that some CCSAs also purport to authorize NEP to collect a "facility fee" to recover the cost of distribution infrastructure installed at the property, which is not disclosed to consumers prior to executing lease or purchase agreements and which also represents a double-recovery of costs, or recovery of funds for which there is no underlying cost (*Id.* at ¶¶ 28-31).

{¶ 32} The Complaint also states NEP bills residents for electric generation service at AEP's standard service offer (SSO) rate, regardless of whether NEP has arranged to supply generation service through a CRES provider. The Complainant concludes that to the extent a CRES provider supplies generation service but residents pay a higher rate based on AEP Ohio's SSO, residents will pay more to NEP than they would if served directly by AEP Ohio (*Id.* at ¶¶ 28-31).

{¶ 33} In addition to other allegations, the Complaint alleges that NEP's name is misleading and that NEP does not disclose its rates charged in its monthly bills to residents or on its website. She also asserts that NEP routinely and in the ordinary course of business disconnects residents during the months covered by the Commission's Winter Reconnect Order, sues customers and former customers for non-payment of utility bills, transfers outstanding balances from the accounts of former residents to the accounts of new residents, and fails to timely process resident moves but then pursues collection activities for services

rendered after a resident has left the premises. The Complaint also asserts that NEP and the other Respondents are operating in violation of various federal and state credit, privacy and antitrust regulations.[2]

{¶ 34} With respect to the following allegations, the Complainant first asserts that none of these claims constitute an essential element of any count in her Complaint. The Complaint then asserts that NEP and Knox have manifested an intent to be public utilities by availing themselves of the benefits of public utilities, that they make their services available to the general public, and that their provision of utility service is not ancillary to their primary businesses. Further, the Complaint contends that, but for the unlawful provision of services by NEP and Knox, the Complainant could obtain utility services from AEP Ohio, Columbia Gas of Ohio, and other Commission-regulated or governmental utility providers at a total lower annual cost than the cost she currently pays. (*Id.* at ¶¶ 50-53).

{¶ 35} Finally, the Complaint asserts that NEP's bills include line items for "distribution," "transmission," and "generation" services, and that NEP supplies or arranges for the supply of metering service, billing and collection service, and ancillary services. The Complainant contends that other than generation, each of these services are "non-competitive" components of retail electric service under R.C. 4928.01(A)(21) and (B); and that by supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption, the Respondents provide "retail electric service" as defined in 4928.01(A)(27), are engaged in the business of an "electric light company" as defined in R.C. 4905.03(C), and an "electric distribution

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2 The Complaint alleges that NEP routinely and in the ordinary course of business seeks to collect outstanding balances from individuals other than its customer of record, in violation of the Equal Credit Opportunity Act, 15 USC 1691 *et seq.* and other applicable law; furnishes false or erroneous information to credit reporting agencies, in violation of the Fair Credit Reporting Act, 15 USC 1681 *et seq.* and other applicable law; and improperly requests and discloses consumers' personal identifying information, in violation of the Privacy Act of 1974, 5 U.S.C. 552a *et seq.* and other applicable law. Further, the Complaint asserts that the activities among NEP and the other Respondents constitute a "trust" formed for the express purpose of eliminating and restraining competition in the market for retail electric generation service under the Ohio Valentine Act, R.C. Chapter 1331 and the Sherman Antitrust Act, 15 USC 1 *et seq.* (*Id.* at ¶¶ 33-42).

utility" and "electric utility" under R.C. 4928.01(A)(6) and (11); and that as such, each Respondent is a "public utility" as defined in R.C. 4905.02(A). The Complaint notes that generation service is a competitive component of retail electric service under R.C. 4928.03, which requires Commission certification under R.C. 4928.08(B); and asserts that, as the rates charged by Respondents have not been approved by this Commission, Respondents are knowingly violating R.C. 4905.22, 4909.18, and 4928.08 by continuing to supply or arrange for the supply of retail electric service at unapproved and unregulated rates. In addition, the Complaint alleges violations of the Commission's rules relating to minimum service requirements for competitive electric services under Ohio Adm.Code Chapter 4901:1-21; minimum service quality, safety, and reliability requirements for non-competitive retail electric services under Ohio Adm.Code Chapter 4901:1-10; termination, credit, and consumer protection rules for residential utility service under Ohio Adm.Code Chapters 4901:1-17 and 4901:1-18; and unfair, misleading, deceptive, or unconscionable marketing practices under Ohio Adm.Code 4901:1-21-05(C) (*Id.* at ¶¶ 64-72, 88-103).

{¶ 36} With respect to water and sewage services at Creekside, the Complainant asserts that NEP's bills include line items for water, storm sewer, and sanitary sewer services. Complainant asserts that NEP and the other Respondents are engaged in the business of supplying water through pipes or tubing to consumers within this state and, therefore, constitute a "water-works company" as defined in R.C. 4905.03(G), and a public utility under R.C. 4905.02(A). Similarly, Complainant asserts that NEP and Respondents are engaged in the business of supplying sewage disposal services through pipes or tubing, and treatment works and, therefore, constitute a "sewage disposal system company" as defined in R.C. 4905.03(M), and a public utility under R.C. 4905.02(A). The Complainant notes that R.C. 4933.25 prohibits water-works and sewage disposal system companies from operating water distribution or sewage disposal facilities unless they have been issued a certificate of public convenience and necessity from this Commission. The Complainant claims that none of the Respondents hold such certifications and are, therefore, continuing to knowingly violate R.C. 4933.25 (*Id.* at ¶¶78-87).

{¶ 37} With respect to the provision of natural gas service, the Complaint alleges that Ms. Wingo is not a member of the Knox cooperative and she accuses Knox of supplying natural gas in violation of the Commission's certification, reporting, and service requirements under Ohio Adm.Code Chapters 4901:1-13, 4901:1-27, 4901:1-29, and 4901:1-30 (*Id.* at ¶¶57-62, 78-87).

{¶ 38} In its prayer for relief, the Complaint seeks a Commission determination that reasonable grounds exist for the hearing of this matter, pursuant to R.C. 4905.26 and 4909.18. The Complainant also seeks Commission findings that the Respondents are knowingly and illegally engaged in the business of a public utility, including the supply of competitive retail electric service; and that the services rendered, as well as the rates and charges exacted by the Respondents are unjust, unreasonable, unfair, discriminatory, and in violation of law. The Complainant also requests that the Commission direct that the Respondents' books and records be audited to determine the amount of profits derived from any unlawful provision of service, and that any excess and unlawful profits be refunded. In addition, the Complainant seeks Commission findings that the Respondents are subject to penalties and forfeitures, in amounts to be determined and assessed under R.C. Title 49; and that Complainant is entitled to an award of damages under R.C. 4928.16(B), subject to trebling under R.C. 4905.61. Further, the Complainant requests that the Commission find that any contracts entered into by the Respondents in furtherance of their unlawful provision of service must be rescinded, in accordance with R.C. 4928.16(B); and that public utility service currently rendered to Creekside is inadequate, inefficient, improper, insufficient, and should be substituted, in accordance with R.C. 4905.37. Finally, the Complainant moves the Commission to direct the Respondents to abandon service to Creekside, in accordance with R.C. 4905.20, subject to identification of a substitute utility service provider.

B. The Answers

{¶ 39} NEP's Answer to the Complaint admits that Ms. Wingo has rented an apartment at Creekside since June 2017, that NEP provides energy management services, including submetering, meter-reading, billing, collections and data analytics, under a

contractual arrangement with the Creekside owners, and that these services include the billing of electric, water, and sewer utility services to the Complainant for her apartment and common areas pursuant to an Addendum that is part of the Lease Agreement between Crawford Communities, LLC, as landlord and management agent, and Ms. Wingo, as tenant, from June 5, 2107 through September 1, 2018 (NEP Answer at ¶¶ 1, 13-18, 20, 22-23, 55-56, 64, 79, 84). NEP also admits that Creekside is located within the geographic boundaries of AEP Ohio's certified territory, and that NEP does not have a certified territory authorizing or requiring NEP to provide electric service. However, NEP generally denies that it provides any jurisdictional public utility services at Creekside, and asserts that NEP is not providing any services for which it must be certified as a supplier of competitive retail electric service under R.C. 4928.08(B), have a certified territory, or hold a certificate of public convenience and necessity to provide electric, natural gas, water or sewer services from this Commission (NEP Answer at ¶¶ 1, 5, 13-18, 20, 28, 43-48, 55-56, 64, 66, 75).

{¶ 40} NEP also admits that it has a contractual arrangement to provide certain services to the owner of Creekside, but NEP asserts that the rates it uses to bill the Complainant are intended to be similar to the rates charged for public utility residential services, including all applicable riders and fees, in addition to community charges for common area electric and water. NEP states that payment for its services are governed by its underlying contractual arrangement with the Creekside owner, and admits that none of the charges for any of its services to the Creekside owner are disclosed in the monthly bills rendered to the Complainant. NEP admits that its rates are not published on its website, and that none of the fees charged by NEP for any of the services it provides to the Creekside owner have been reviewed or approved by the Commission, though NEP also denies that such fees are required to be reviewed or approved by the Commission (NEP Answer at ¶¶1, 5, 13-18, 20, 22-23, 28, 43-48).

{¶ 41} In its answer to the Complaint, Knox admits that Ms. Wingo is a residential tenant at Creekside, but asserts that Knox is a non-profit cooperative association and the sole provider of natural gas distribution service at Creekside, and that Knox provides such

service directly to its members, including Ms. Wingo, through its own lines and meters. Knox denies that it has any relationship with NEP, or is a party to any CCSA. According to its answer, Knox bills its members directly for natural gas service based on readings from Knox's meter at the tenant's premises at the same rate that Knox charges all other Ohio residential members. Knox also asserts that natural gas service is the only form of utility service that Knox provides, and thus Knox generally denies any allegations that do not apply to the provision of natural gas service. Moreover, as a non-profit cooperative association providing natural gas service under R.C. 4905.02(A)(2), Knox denies that the Commission has jurisdiction over its rates and charges for natural gas service, or that R.C. 4905.22, 4905.30, 4905.32, and 4909.18 are applicable to Knox. Finally, Knox states that the Utility Addendum to Ms. Wingo's lease dated June 5, 2017, authorizes the landlord to secure gas service to the Complainant's apartment on her behalf. Knox notes that the landlord is itself a Knox member with respect to unoccupied tenant space, and alleges that the landlord electronically submitted a Membership Application and Agreement on behalf of the Complainant as a new tenant to convert the service to her prior to occupancy of the premises. Finally, Knox states that if the Complainant objects to being a Knox member, Knox will remove her from membership and terminate natural gas service to her apartment (Knox Answer at ¶¶ 1, 6, 8, 17-18, 22-27, 43, 48, 52-54, 60).

{¶ 42} In their answer, Crawford Hoying first requests that the Commission dismiss this case until the pending Commission investigation is complete and until JCARR approves any new rules or rule modifications proposed by the Commission. Crawford Hoying admits that the Complainant signed a lease in June of 2017 that identifies Crawford Communities, LLC, as the Management Agent, but denies that it still serves in that capacity. Crawford Hoying's answer generally denies most of the allegations in the Complaint, and asserts various affirmative defenses including lack of reasonable grounds, personal and subject matter jurisdiction, standing, and estoppel by acquiescence (Crawford Hoying Answer at 2, 7-8 and ¶¶ 1, 13, 33-34).

C. The Motions to Dismiss

1. NEP's MOTION TO DISMISS

{¶ 43} In its Motion to Dismiss, NEP requests that the Complaint against NEP be dismissed with prejudice because NEP is not a public utility subject to this Commission's jurisdiction under the *Shroyer* Test. NEP further asserts that as NEP is not a public utility and, based on the resulting lack of subject matter jurisdiction, the Commission should disregard the Complainant's remaining allegations against NEP.

{¶ 44} NEP argues that the Commission may issue its decision on this jurisdictional question without a hearing given the known dispositive facts. NEP asserts that the Commission may rule upon its Motion to Dismiss based upon the submitted evidence, and is not required to accept as true the allegations in the Complaint. NEP argues that when considering a motion to dismiss for lack of subject matter jurisdiction under Ohio Adm.Code 4901-9-01(C), "the Commission is not confined to the allegations of the complaint when determining its subject matter jurisdiction; rather it may consider any pertinent evidentiary materials." *Brooks*, Case No. 94-1987-EL-CSS, Entry (Mar. 16, 1995) at ¶7, citing *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526, 2 O.O. 3d 393 (1976) ¶ 1 of the syllabus, and *Nemazee v. Mt. Sinai Medical Ctr.*, 56 Ohio St.3d 109, 115, 564 N.E.2d 477 (1990), n. 3. NEP contends that a respondent in a complaint proceeding may assert a lack of jurisdiction over the subject matter of the action, and NEP argues that the standard of review for the analogous provision in the Ohio Rules of Civil Procedure, Civ. R. 12(B)(1), is "whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989).

{¶ 45} NEP cites *In re Pledger v. Capital Properties Management, Ltd.*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004) *aff'd sub nom Pledger*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, as precedent for this Commission's dismissal of a complaint for lack of subject matter jurisdiction, and NEP argues that, having clarified the applicability of the *Shroyer*

Test to the resale or redistribution of utility service in the *Jun. 21, 2017 COI Entry*, the Commission may now apply the *Shroyer* Test in this proceeding to make the threshold jurisdictional determination, and avoid the time and expense of a protracted hearing (NEP Motion to Dismiss at ¶¶ 2-4).

{¶ 46} Along with its Motion to Dismiss, NEP submitted the affidavit of John Calhoun, NEP's Account Manager, and supporting documentation. Mr. Calhoun states that NEP does not have a grant of franchised territory or a certificate of public convenience and necessity, and it does not use either eminent domain or public rights of ways for utility purposes. (NEP Motion to Dismiss, Aff. Calhoun at ¶ 21). According to Mr. Calhoun's affidavit, NEP provides energy management services at Creekside, under contract with the current property owner, Creekside Acquisition Columbus Associates II, LLC (CACA or Landlord), which acquired Creekside in August 2017. Mr. Calhoun states that NEP's services under this contract include maintenance of water and electric meters as well as certain electric lines and equipment owned by CACA at Creekside; payment of AEP Ohio's electric distribution and generation service charges and the City of Reynoldsburg's water and sewer charges on CACA's behalf; water and electric submeter reading, invoicing to and collection from tenants for charges related to electric, water, and sewer usage on CACA's behalf; and additional services such as energy efficiency consultations, high usage alerts, and vacant unit reporting services (*Id.* at ¶¶ 6-8, 10-11).

{¶ 47} Further, Mr. Calhoun states that in June 2017, electric generation service to Creekside was provided by Interstate Gas Supply, Inc. (IGS) through a contract between IGS and CACA's predecessor-in-interest, Creekside Acquisition Columbus Associates LLC; and that since July 2017, electric generation service is provided to Creekside by AEP Ohio. Mr. Calhoun also affirms that NEP does not take title to the electric power provided by AEP Ohio, or the water or sewer services provided by Reynoldsburg into Creekside; and that NEP does not own any utility infrastructure at Creekside except for the electric submeters which were installed when Creekside was converted to a submetered complex in 2011. In addition, Mr. Calhoun submitted documentation of NEP's bills to the Complainant and

NEP's calculation of the five monthly billing periods, from June 4 through October 25, 2017, in support of his testimony that NEP's invoiced charges to Ms. Wingo have been $8.07 less than AEP Ohio's default service tariff charges for that same period and usage (*Id.*, ¶¶ 18-20, Exhibit C).

{¶ 48} NEP argues that the undisputed facts, when applied under the *Shroyer* Test, are dispositive of this proceeding. NEP asserts that (1) it has not availed itself of the special benefits available to public utilities, such as the right of eminent domain; (2) that NEP's services are not utility services, and are not available to the general public but are limited to multi-family property owners, managers, and developers who contract with NEP; and (3) that NEP does not provide water, sewer, or electric services at Creekside. As noted by NEP's witness, the electric service is provided to CACA at Creekside by AEP Ohio, while water and sewage services are provided by Reynoldsburg (*Id.* at ¶¶ 6-8, 10, 13-15). Further, according to Mr. Calhoun, NEP does not take title to any utility commodity or own any utility facilities at Creekside except the electric submeters (*Id.* at ¶¶ 16-17). Moreover, NEP claims that even if it is deemed to be providing electric utility service, Mr. Calhoun's testimony demonstrates that NEP qualifies for the second jurisdictional safe harbor under the third prong of the *Shroyer* Test, in that the electric usage rates charged to Complainant did not exceed AEP Ohio's residential default rates on an annual basis (*Id.* at ¶¶ 18-20, Exhibit C). NEP states that it is not a jurisdictional public utility and remains an energy management service provider to its customers, i.e., the property owners, managers and developers who contract with NEP (NEP Motion to Dismiss at 1-2). [3]

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3 In support of its Motion to Dismiss, NEP also notes that in June 2017, when Ms. Wingo leased her apartment at Creekside, her prior complaint against NEP in *Wingo 1* was still pending. NEP asserts that Ms. Wingo filed her Complaint in this case shortly after moving in to her Creekside apartment, despite acknowledging in the Creekside lease agreement and agreeing in writing in the lease's Utility Addendum that NEP would be providing energy management services at her Creekside apartment under submetered electric and water service arrangements (Complaint, Ex. A at 36, 40; NEP Motion to Dismiss at 1-2, Ex. 1).

2. CRAWFORD HOYING'S MOTION TO DISMISS

{¶ 49} In Crawford Hoying's Motion to Dismiss, they note that Ms. Wingo's first complaint against NEP was dismissed in the Commission's November 21, 2017 Finding and Order (*Wingo 1 Order*), which held that the resale of utility service at the Complainant's previous residence falls within the safe harbor provisions established in the *Jun. 21, 2017 COI Entry. Wingo 1 Order* at ¶26. Crawford Hoying asserts that they do not provide any utility services and pass each of the three prongs of the *Shroyer* Test. They argue that this Commission need not accept Complainant's accusation that Crawford Hoying is a utility, which is "a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Crawford Hoying contends that under Ohio law, "unsupported conclusions of a complaint...are not sufficient to withstand a motion to dismiss." *NCS Healthcare, Inc. v. Candlewood Partners, LLC*, 160 Ohio App.3d 421, 2005-Ohio-1669, ¶ 19 (8th Dist.) (quoting *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324 (1989)). Instead, Crawford Hoying argues, a Complaint must set forth "operative facts" supporting the conclusions of law and giving "fair notice" of the nature of the action. *State ex rel. Hughley v. Ohio Dep't of Rehab. and Corr.*, 10th Dist. No. 09AP-244, 2010-Ohio-1585, ¶ 5 (citing *Canady v. Rekau & Rekau, Inc.*, 10th Dist. No. 09AP-32, 2009-Ohio- 4974, ¶ 20). In other words, Crawford Hoying asserts, "the basic facts of the incident, transaction, or occurrence that gives rise to a claim for relief must be stated." *Oxford Sys. Integration, Inc. v. Smith-Boughan Mech. Servs.*, 159 Ohio App.3d 533, 2005-Ohio-210, ¶ 10 (2d Dist.) (quoting Baldwin's Ohio Civil Practice (2d Ed.2001), § 8:1, at pp. 710-711.). Crawford Hoying contends that if the complaint does not plead these "operative grounds creating the claim," dismissal for failure to state a claim is appropriate. *Johnson v. Ferguson-Ramos*, 10th Dist. No. 04AP-1180, 2005-Ohio-3280, ¶ 49 (quoting *Marsalis v. Wilson*, 149 Ohio App.3d 637, 2002-Ohio-5534, ¶ 2 (2d Dist.)).

3. MEMORANDA CONTRA NEP'S MOTION TO DISMISS

{¶ 50} The Complainant responds to NEP's motion to dismiss by asserting that there are reasonable grounds for complaint under R.C. 4905.26, which preclude summary dismissal, but she does not dispute Mr. Calhoun's calculations, or any of the facts admitted

by NEP.[4] The Complainant argues that R.C. 4905.26 does not permit summary judgments even if the facts are not disputed, and that the *Shroyer* Test cannot be resolved on the basis of an affidavit submitted by the submetering company in question. *In re Dennewitz, et al, v. Dominion East Ohio*, Case No. 07-517-GA-CSS, Entry (Oct. 24, 2007) at 5. Rather, Ms. Wingo asserts that she is entitled to an opportunity for discovery and an evidentiary hearing. The Complainant also cited an attorney examiner's holding for the proposition that "when a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party." *In re Ohio Consumers' Counsel v. Dominion Retail Inc.*, Case No. 09-257-GA-CSS, Entry (Jul. 1, 2009) ¶7 at 3, citing *In re XO Ohio, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on Rehearing (Jul. 1, 2003) ¶8 at 2. Both the Complainant and AEP Ohio argue that the Commission is statutorily required under R.C. 4905.26 to set a complaint for hearing where reasonable grounds for the complaint are apparent and undisputed. *Allnet Comm. Servs., Inc. v. Public Util. Comm.*, 32 Ohio St. 3d 115, 118 (1987).

{¶ 51} In this proceeding, the Complainant suggests that there may be factual disputes regarding allegations of NEP pay-offs to property owners and developers, and whether the lack of a written service agreement between NEP and Ms. Wingo should preclude the Complainant from being a "customer" of NEP. The Complainant asserts that NEP's alleged contracts with third parties are not dispositive of the true provider/customer relationship, and that the Commission cannot blindly accept NEP's purported agreements at face value. She argues that where "the totality of the evidence could indicate that the intention of the deal" was to circumvent Ohio law, the Commission may "look beyond the surface" of written agreements to consider whether there was an "underlying deal" to circumvent regulation. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 76 Ohio St. 3d 521, 524, 1996-Ohio-298. Finally, the Complainant alleges that tenants at both Creekside and her prior

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4 The Complainant's memorandum contra NEP's motion to dismiss in this case incorporates by reference, at 1, the arguments made in her October 27, 2017 memorandum contra NEP's motion to dismiss her first complaint, including general assertions that there are reasonable grounds for complaint under R.C. 4905.26, which preclude summary dismissal.

residence were once directly served by AEP Ohio, but that NEP orchestrated a deal for AEP Ohio to sell the distribution infrastructure serving these properties to the property owners, with NEP signing the agreement to transfer these facilities. 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 (Complainant's November 16, 2017 memorandum contra at 1-4).

{¶ 52} In its memorandum contra NEP's motion to dismiss the Complaint, AEP Ohio cites R.C. 4903.082 and 4905.26 in arguing that the rights to discovery and a hearing are mandatory in this complaint case, and *Allnet*, 32 Ohio St.3d 115, 118, in which the Court reversed the Commission's dismissal of a complaint without a hearing. AEP Ohio also cites the *Jun. 21, 2017 COI Entry* at ¶ 31 in contending that, in the context of a submetering complaint, the Commission must weigh the facts and circumstances of each case, and that our consideration of whether any individual Reseller is a public utility must be made after the development of an evidentiary record.

{¶ 53} In its reply to the memoranda contra of the Complainant and AEP Ohio, NEP argues that 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. NEP argues that the Commission's authority to apply the *Shroyer* Test on a motion to dismiss is supported by the Commission's rules and case law, noting that Ohio Adm.Code 4901-9-01(C)(1) authorizes a respondent in a complaint proceeding to assert, by motion, the defense of the "lack of jurisdiction over the subject matter," and citing *Toledo Premium Yogurt, Inc. v. Toledo Edison Co., et al.*, Case No. 91-1529-EL-CSS, Entry (Sep. 17, 1992); *Brooks*, 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*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004), *aff'd sub nom Pledger*, 109

Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14. With respect to *Allnet.*, 32 Ohio St. 3d 115, cited by the Complainant and AEP Ohio for the proposition that Ms. Wingo's complaint cannot be dismissed through a motion, NEP argues that *Allnet* is inapplicable because it related to the Commission's dismissal of a complaint as an untimely application for rehearing and did not address the issue of whether an entity is a public utility subject to the Commission's jurisdiction.

VI. DISCUSSION

{¶ 54} According to the Complaint, NEP, Knox, and Crawford Hoying provide metering, billing, and collection services for the use of electric, water, and sewer services, as well as for usage in common areas, under the Utility Addendum that is part of the Lease Agreement between the Crawford landlord and Ms. Wingo, for the period of June 5, 2017 through September 1, 2018 (Complaint at ¶¶ 55-57, Ex. 1 at 3, 36). However, analysis of the pleadings reveals that each arrangement with respect to these services is different and, therefore, should be considered separately.

A. Natural Gas Service

{¶ 55} With respect to the provision of natural gas service at Creekside, Knox states that the Complainant is a member of Knox, and is directly served by Knox through the Utility Addendum to Ms. Wingo's lease which authorized the landlord to secure gas service to the Complainant's apartment on her behalf (Complaint at Ex. 1 at 3, 36). In its Answer, Knox asserts that it is a non-profit cooperative association and the sole provider of natural gas distribution service at Creekside, and that Knox provides such service directly to its members through its own lines and meters. According to its answer, Knox bills its members directly for natural gas service based on readings from Knox's meter at the tenant's premises at the same rate that Knox charges all other Ohio residential members. (Knox Answer at ¶¶ 6, 8, 22, 60)

{¶ 56} The Complainant has failed to dispute Knox's assertions or provide other evidence. Therefore, we conclude that there is no resale or redistribution of natural gas by

the Creekside Landlord since Knox is directly providing natural gas service to Ms. Wingo's apartment, and directly billing the Complainant. Accordingly, we find that no resale or redistribution of natural gas service has occurred under the facts in this case and, thus, there is no need to apply the *Shroyer* Test to determine our jurisdiction over natural gas service at the Complainant's Creekside Apartment. Further, we note that, as a non-profit cooperative, Knox is not subject to our jurisdiction under R.C. 4905.02(A)(2). Therefore, we are unable to address any dispute regarding whether Complainant is, or is not, a member of Knox. Accordingly, with respect to Knox, the Complaint should be dismissed.

B. Water Service

{¶ 57} With respect to water and sewage services at Creekside, the Complaint asserts that NEP's bills include line items for water, storm sewer, and sanitary sewer services. The Complainant asserts that the Respondents are engaged in the business of supplying water and sewage disposal services through pipes to consumers within this state and, therefore, constitute a "water-works company" and a "sewage disposal system company" as defined in R.C. 4905.03(G) and R.C. 4905.03(M), respectively. The Complainant concludes that the Respondents are operating as a public utility under R.C. 4905.02(A) without certification by this Commission in contravention of R.C. 4933.25 (Complaint at ¶¶78-87).

{¶ 58} NEP's Account Manager states that NEP does not take title to the water or sewer services, which are provided to Creekside by the city of Reynoldsburg. Mr. Calhoun also affirmed that NEP does not own any utility infrastructure at Creekside except for the electric submeters (NEP Motion to Dismiss 1-2, Aff. Calhoun at ¶¶ 18-20, Ex. C). He states that NEP pays the charges for water and sewer services from Reynoldsburg, reads the water submeters, and handles the billing and collection from Creekside tenants for such water and sewer services (*Id.* at 5-6, Aff. Calhoun at ¶¶ 8, 10). We also note that the Complainant's lease agreement requires that the "[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" (Complaint, Exhibit A at 36).

{¶ 59} The statutory definitions in R.C. 4905.02 and 4905.03 are not self-applying to the landlord-tenant relationship. *Pledger*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 17, 26. The owner of an apartment complex does not become a public utility under R.C. 4905.02 when it meters its tenants' usage of city-supplied water and charges its tenants for their water and sewage use plus a fee. *Id.* at syllabus. And a landlord does not become a water-works or sewage disposal company merely through the resale of water or sewage-disposal services to its tenants. *Id.* at ¶ 28. Rather, R.C. 4905.03(G) defines a water-works company as "engaged in the business of supplying water * * * to consumers within this state" and the Court has consistently upheld the Commission's determination that it is the landlord, not the tenant, who is the consumer. *Id.* at ¶ ¶ 32-39. See also, *Jonas v. Swetland Co.*, 119 Ohio St. 12, 162 N.E. 45 (1928); *Shopping Ctrs. Assn. v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 32 O.O.2d 1, 208 N.E.2d 923 (1965), and *FirstEnergy*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶9.

{¶ 60} The meaning of "public utility," although sometimes elusive, has gradually evolved through case law. *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 387, 596 N.E.2d 423, 1992-Ohio-23. Determination of whether a particular entity is a public utility is a mixed question of law and fact. *Marano v. Gibbs*, 45 Ohio St.3d 310, 311, 544 N.E.2d 635 (1989). The resolution of the question of whether an enterprise is operating as a public utility is decided by an examination of the nature of the business in which it is engaged. *Indus. Gas Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 14 O.O. 290, 21 N.E.2d 166, (1939), paragraph one of the syllabus. Although case law provides a list of characteristics common to public utilities, it is generally recognized that none of these characteristics is controlling. *Montville Bd. of Twp. Trustees v. WDBN, Inc.*, 10 Ohio App.3d 284, 10 OBR 400, 461 N.E.2d 1345 (1983). That is, each case must be decided on the facts and circumstances peculiar to it. *A & B Refuse Disposers* at 387, citing *Indus. Gas Co.*, supra, at 413. 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.

{¶ 61} As noted above, the Commission's traditional three-part test for determining whether a company is acting as a public utility and, therefore, should be subject to the jurisdiction of this Commission, was established in the 1992 *Shroyer* case:

> (1) Has the landlord manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right-of-way for utility purposes?
>
> (2) Is the utility service available to the general public rather than just to tenants?
>
> (3) Is the provision of utility service ancillary to the landlord's primary business?
>
> *Shroyer*, Opinion and Order (Feb. 27, 1992) at 4-6.

{¶ 62} In *Pledger*, the landlord provided submetered water and sewer service from municipal utilities to its apartment complex at the municipal rate plus ten percent. The Court reviewed the Commission's use of the *Shroyer* Test under similar facts[5] and upheld the Commission's findings that the landlord did not manifest an intent to be a public utility under the first prong, and did not hold itself out as providing water and sewer services to the general public under the second prong. Further, the Court noted the Commission's determination under the third prong that the landlord's provision of water and sewer services to its tenants was ancillary to its primary business of being a landlord, in holding that the Commission's dismissal of the complaint was reasonable and lawful. *Pledger*, 109 Ohio St.3d 463-64, 466-67.

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5 In *Shroyer*, the mobile home park owner installed water meters and began charging tenants for water based on their usage at the city's higher residential rate than the commercial rate paid by the landlord. *Pledger*, 109 Ohio St.3d 463, 465-66.

{¶ 63} The resale of submetered residential water service and sewage disposal in the case now before us is similar to that in *Pledger*, as well as in an earlier Commission decision involving submetered municipal water service in two other mobile home parks, *In re Dumeney v. Aquameter, Inc.*, Case No. 96-397-WW-CSS, Opinion and Order (Jan. 4, 2001). In that case, complaints were filed against Aquameter, a water submetering company that provided metering and billing services to residents for water and sewer services owned by the two mobile home parks for water from the county or municipal system. There, the Commission found that the water submetering company had no contractual agreement with the actual supplier of water, or with the end-use customer, and concluded that Aquameter was not in the business of supplying water to the public, did not fit within the definition of a water-works company under R.C. 4905.03(A)(8), and was not, therefore, subject to Commission jurisdiction. *Aquameter*, at 5-6.

{¶ 64} In the instant case, neither the Creekside Landlord nor its agents, Crawford Hoying or NEP, hold a franchised territory or certificate authority, or have used eminent domain or a public right-of-way for utility purposes, as required under the first prong of the *Shroyer* Test (NEP Motion to Dismiss at 8-9, Aff. Calhoun at ¶ 21). As the Complainant has failed to provide any allegations to the contrary, we find that the Creekside Landlord and its agents are not deemed to be operating as a public utility with respect to the provision of water and sewer services at Creekside under the first prong of the *Shroyer* Test.

{¶ 65} With respect to the second prong of the *Shroyer* Test, we find no basis for concluding that the water or sewer services at Creekside is also available to the general public. Crawford Hoying denies that it provides any service outside the confines of the properties it manages (Crawford Hoying Motion to Dismiss at 6-7), whereas a jurisdictional public utility provides service available to the public generally and indiscriminately. *Southern Ohio Power Co v. Pub. Util. Comm.*, 110 Ohio St. 246, 252, 143 N.E. 700, 34 A.L.R. 171 (1924). 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 (NEP Motion to Dismiss at 9-10, Aff. Calhoun at ¶3). The Landlord's provision of utility services

here appears to be limited to the Creekside Apartments, notwithstanding the fact that these apartments are available for lease to the general public. A landlord does not become a regulated public utility merely through the redistribution of utility service to its tenant. *Jonas*, 119 Ohio St. 12, 162 N.E. 45 (1928); *Pledger*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, at syllabus, ¶ 28. As the Complainant has failed to provide any evidence to the contrary, we find that the Creekside Landlord and its agents are not deemed to be operating as a public utility with respect to the provision of water and sewer services at Creekside under the second prong of the *Shroyer* Test.

{¶ 66} Having passed the first two prongs of the *Shroyer* Test, we turn to the question of whether the provision of water or sewer services are ancillary to the Creekside Landlord's primary business under the third prong. As discussed above, this case is similar to the complaint in *Pledger*, where the Court upheld the Commission's analysis and determination that the landlord's primary business was that of being a landlord, and to the extent that it provided water and sewer service to its tenants, the provision of those services was ancillary to that primary business. *Pledger*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 25-31. We also note that NEP's operations at Creekside are virtually identical to those provided to the mobile home parks in *Aquameter*. Furthermore, Mr. Calhoun has provided credible evidence that the Creekside Landlord is merely passing through the cost of water and sewer service from the city of Reynoldsburg (NEP Motion to Dismiss, Aff. Calhoun at ¶¶ 8, 10, 14-18, Ex. B). Accordingly, we find that the provision of submetered water and sewer service at Creekside is ancillary to the landlord's operations under the third prong of the *Shroyer* Test and, therefore, should not be subject to Commission jurisdiction.

C. Electric Service

{¶ 67} Having found that no resale or redistribution of natural gas service has occurred at the Complainant's Creekside Apartment, and that the provision of submetered water and sewer service at Creekside is not subject to our jurisdiction, we will consider the Complainant's allegations regarding the provision of electric service at her Creekside Apartment.

{¶ 68} As discussed above, the Complainant does not refute the Respondents' assertions, and we find no credible basis in the record before us, to conclude to the contrary, that neither the Creekside Landlord nor its agents, hold a franchised territory or certificate of authority, or have used eminent domain or a public right-of-way for utility purposes, as required under the first prong of the *Shroyer* Test (NEP Motion to Dismiss, Aff. Calhoun at ¶ 21). Furthermore, we find no basis for concluding that the electric service made available to the Creekside tenants is also available to the general public as required under the second prong of the *Shroyer* Test (*Id.* at ¶¶ 2-5).

{¶ 69} Having applied the first two prongs of the *Shroyer* Test, we turn to the question of whether the provision of electric service is ancillary to the Creekside Landlord's primary business according to the third prong as modified by the Rebuttable Presumption, Relative Price Test and Safe Harbor Exceptions, given the pleadings and record in this case.

1. MODIFICATION OF THE SHROYER TEST

{¶ 70} In the *Jun. 21, 2017 COI Entry*, we said that any complaint regarding residential submetered electric, natural gas, water and/or sewer services should be analyzed on a case-by-case basis under the *Shroyer* Test to determine if the submetered arrangement is subject to Commission jurisdiction, and we added a modification to the third prong of that test in order to provide further guidance regarding how we would determine whether the provision of such service is ancillary to the Reseller's primary business. We now affirm that the guidance that we announced in the *Jun. 21, 2017 COI Entry* should be applied in this case. Accordingly, in this case, we will impose a Rebuttable Presumption that the provision of electric service is not ancillary to the Creekside Landlord's primary business, and should be deemed jurisdictional, if CACA and its agents fail the Relative Price Test by charging more than what the Complainant would have paid for comparable service under the applicable public utility's default service tariff.

{¶ 71} The *Jun. 21, 2017 COI Entry* also announced two Safe Harbors that would allow the Reseller to rebut the presumption: (1) where the Reseller is simply passing through its

annual costs of providing a utility service charged by the public utility (and generation charges from a CRES provider, if applicable) to submetered residents at a given premises; or (2) where 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. *Jun. 21, 2017 COI Entry* at ¶¶ 40, 49-50.[6]

{¶ 72} Further, we also adopt the Safe Harbor exceptions to the Relative Price Test created in the *COI Jun. 21, 2017 Entry* that will allow the Reseller to rebut the presumption that its provision of such service is not ancillary to the Reseller's primary business. The first Safe Harbor exception allows a Reseller of submetered residential utility service to prove that its provision of such service is truly ancillary if the Reseller demonstrates that it is simply passing through its annual costs of providing the utility service charged by the local public utility (and the competitive retail service provider, if applicable) to its submetered residents.

{¶ 73} Under the second Safe Harbor exception, the Reseller's annual charges for a utility service to an individual submetered resident do not exceed what the resident would have paid under the local public utility's default service tariff for equivalent annual usage on a total bill basis. This exception is justified because the resident can not be considered harmed by the submetered arrangement if the resident is paying the same amount as if the resident was served directly by the public utility. The Complainant has the burden of proving that she suffered some injury in this proceeding. *Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St.3d 509, 684 N.E.2d 43, 1997-Ohio-342, citing *Grossman v. Pub. Util. Comm.* (1966), 5

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6 This decision is consistent with our holding in *Wingo 1*, which granted NEP's motion to dismiss that complaint, finding that the Complainant had failed to meet her burden of proof in alleging reasonable grounds for hearing as required by R.C. 4905.26, after applying the Rebuttable Presumption, Relative Price Test, and Safe Harbors under the third prong of the *Shroyer* Test. *Wingo 1*, Finding and Order (Nov. 21, 2017). However, in the Commission's First Entry on Rehearing in that case, we concluded that the Complainant's application for rehearing was not timely filed and, therefore, the Commission had no jurisdiction to consider Ms. Wingo's application for rehearing. *Wingo 1*, First Entry on Rehearing (Jan. 17, 2018) at ¶15. Rehearing of this decision was granted on March 14, 2018 and is still pending.

Ohio St.2d 189, 34 O.O.2d 347, 214 N.E.2d 666; *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1984), 14 Ohio St.3d 49, 50, 14 OBR 444, 445, 471 N.E.2d 475. After reviewing the pleadings and factual admissions of record in this particular case, we reaffirm our determination that that these modifications to the third prong of the *Shroyer* Test provide a reasonable basis for determining whether residential submetered arrangements should be subject to this Commission's jurisdiction.

2. APPLICATION OF THE RELATIVE PRICE TEST AND SAFE HARBOR EXCEPTIONS

{¶ 74} As explained above and in the *Jun. 21, 2017 COI Entry*, for complaints concerning submetered residential service, if a resident asserts that he or she has been harmed by paying more than if directly served under the comparable public utility rate, the Rebuttable Presumption shifts the burden of production to the Reseller to demonstrate that its provision of utility service is ancillary to its operations under the third prong of the *Shroyer* Test.

{¶ 75} Applying the Rebuttable Presumption to this case, the Complainant has alleged that she has been harmed by paying more for electric service than if she was directly served by AEP Ohio, thereby shifting the burden of proof to the Creekside Landlord and its agents. In this case, the Complainant has submitted with her Complaint a single month's bill for electrical service from NEP dated June 27, 2017 in the amount of $40.93, but no comparison of her bill with what she would have paid for the same usage had she been served directly by AEP Ohio (Complaint, Ex. B; NEP Motion to Dismiss, Ex. C at 2 of 16). We will accept Complainant's unsupported allegation that this amount exceeds what she would have paid for the same usage had she been served directly by AEP Ohio and conclude that Complainant has met the Relative Price Test. However, 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. Complainants should cooperate with the Commission's Staff and/or the appropriate local public utility in developing such

comparison, which should also be included with the complaint. Each utility has been previously ordered to provide "a website tool or other mechanism to provide submetered residential customers with an estimated calculation" of what a customer would have paid for equivalent usage under default service. *June 21, 2017 COI Entry at ¶ 41.*

{¶ 76} Next, the Resellers, CACA and NEP, are provided an opportunity to rebut the presumption that the provision of these utility services is not ancillary to their primary business by meeting either of the two Safe Harbors: (1) the Resellers are simply passing through their annual costs of providing the electric service charged by AEP Ohio to the Complainant; or (2) the Resellers' annual charges for these utility services to the Complainant do not exceed what the Complainant would have paid AEP Ohio for her annual usage on a total bill basis.

{¶ 77} In its motion to dismiss this Complaint, NEP asserts that it qualifies for the second Safe Harbor exception because the electric usage rates which NEP billed to the Complainant did not exceed what the Complainant would have paid on an annual basis if she had been directly served under AEP Ohio's residential default rates (NEP Motion to Dismiss at 1-2). In support of this assertion, NEP presented its bills to the Complainant and its calculation of the five monthly billing periods, from June 4 through October 25, 2017, as well as the credible statements in Mr. Calhoun's affidavit that NEP's invoiced charges to Ms. Wingo have been $8.07 less than AEP Ohio's default service tariff charges for that same period and usage (NEP Motion to Dismiss 7-8, Aff. Calhoun at ¶¶ 18-20, Exhibit C). Moreover, the Complainant does not dispute Mr. Calhoun's calculations.

{¶ 78} As noted above, the Complainant here only submitted one month's bill from NEP and has not offered additional evidence to dispute the Respondents' evidence that during her tenancy, NEP's invoiced charges were less than what she would have paid for the same period and usage under AEP Ohio's default service tariff on an annualized basis. Thus, Complainant does not dispute NEP's calculation of the charges and has provided no other evidence to dispute NEP's calculation. After reviewing the record in this case and

accepting all material allegations of the Complaint as true, and construing such allegations in favor of the complaining party, the Commission finds that the provision of electric service to Ms. Wingo's Creekside apartment, falls within the second Safe Harbor Exception.[7] Accordingly, we will deem the provision of submetered electric service at Creekside to be incidental to the landlord's operations under the third prong of the *Shroyer* Test and, therefore, not subject to Commission jurisdiction.

D. Reasonable Grounds for Complaint are Prerequisite for Hearing

{¶ 79} 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.

{¶ 80} The Commission's jurisdiction to hear complaints regarding the public utilities it regulates is defined by R.C. 4905.26, which states:

> Upon complaint in writing against any public utility by any person * * * that any * * * service * * * is in any respect unjust [or] unreasonable, * * * or that any * * * practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, [or] insufficient, * * * if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. * * *

{¶ 81} The Complainant cites *In re Dennewitz, et al, v. Dominion East Ohio*, Case No. 07-517-GA-CSS, Entry (Oct. 24, 2007) at 5, in arguing that R.C. 4905.26 does not permit

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7 While we will adopt and apply the Relative Price Test to the resale of residential submetered electric service in this case, we expect that analysis in future submetering complaints may require longer comparison periods to reflect annualized data in accordance with the facts and circumstances of each specific arrangement.

summary judgments even if the facts are not disputed, and that the *Shroyer* Test cannot be resolved on the basis of an affidavit submitted by the submetering company in question.[8] The Complainant also cites *In re Ohio Consumers' Counsel v. Dominion Retail Inc.*, Case No. 09-257-GA-CSS, Entry (Jul. 1, 2009) ¶7 at 3, for the proposition that "when a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party" citing *In re XO Ohio, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on Rehearing (Jul. 1, 2003) ¶8 at 2. These arguments were fully considered in the Complainant's first case.[9]

{¶ 82} While, the Commission's procedural rules do not provide for summary judgment in complaint proceedings, the statutory language makes clear that, prior to setting a complaint for hearing, the Commission must determine whether reasonable grounds to justify a hearing have been stated. "Broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony." *In re Consumers' Counsel v. The Dayton Power & Light Company*, Case No. 88-1085-EL-CSS, Entry (Sept. 27, 1988). Instead, "if the complaint is 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." To find otherwise and "permit a complaint to proceed to hearing when [the] complainant has failed to allege one or more elements necessary to a finding of unreasonableness or unlawfulness would improperly alter both the scope and burden of proof." *In re Ohio Consumers' Counsel v. West Ohio Gas Co.*, Case No. 88-1743-GA-CSS, Entry (Jan. 31, 1989) at 10.

{¶ 83} Furthermore, the Complainant has the burden of proving her complaint, including that she suffered some injury, in this proceeding. *Luntz Corp*, 79 Ohio St.3d 509, citing *Grossman*, 5 Ohio St.2d 189; *Ohio Bell*, 14 Ohio St.3d 49. As noted in our discussion

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8 As noted above, the Complainant's memorandum contra NEP's motion to dismiss in this case incorporates by reference, at 1, the arguments made in her October 27, 2017 memorandum contra NEP's motion to dismiss her first complaint at 1-2, including general assertions that there are reasonable grounds for complaint under R.C. 4905.26, which preclude summary dismissal.

9 *Wingo 1 Order* at ¶¶20, 23-26.

above, the Complainant has failed to show that she has suffered any injury since she was not paying more for electric service at her apartment than she would have paid had she been directly served by AEP Ohio at the applicable default service rate for comparable usage (NEP Motion to Dismiss 7-8, Aff. Calhoun at ¶¶ 18-20, Exhibit C).

{¶ 84} AEP Ohio cites our *Jun. 21, 2017 COI Entry* at ¶31 in contending that, in the context of a submetering complaint, the Commission must weigh the facts and circumstances of each case, and that our consideration of whether any individual Reseller is a public utility must be made after the development of an evidentiary record. While it is our intent to consider the specific facts and circumstances of each submetering complaint, a hearing may not be necessary in every case. The pleadings and admissions by the parties may be sufficient to determine if reasonable grounds for the complaint exist. See, *Stephens v. Pub. Util. Comm.*, 102 Ohio St.3d 44, 47, 2004-Ohio-1798, 806 N.E.2d 527, 531, holding that the evidence to be considered by the Commission is not limited only to evidence adduced at a hearing.

{¶ 85} In this case, we 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. *Ohio Utilities Co. v. Public Utilities Comm.*, 58 Ohio St.2d 153, 159, 389 N.E.2d 483, 12 O.O.3d 167 (1979). Accordingly, we find that the Complaint should be dismissed.

{¶ 86} AEP Ohio cites *Allnet*, 32 Ohio St.3d 115, 118, as precedent for the Court reversing a Commission order that dismissed a complaint without first holding a hearing. However, in a subsequent decision involving the same matters, the Court noted that the Commission had dismissed the complaint on the basis that the complaint constituted an untimely application for rehearing and was an improper collateral attack on the Commission's prior order regarding Ohio's telecommunications access-charge mechanism following the breakup of the American Telephone & Telegraph Company. The Court noted that the Commission's entry dismissing Allnet's complaint acknowledged that the points

raised by Allnet in its pleading should be considered, but ultimately concluded that Allnet's complaint was not the proper vehicle to consider generic issues, and that the issues raised were not yet ripe for adjudication. *Allnet*, 38 Ohio St.3d 195-96. In this proceeding, our decision to dismiss this Complaint is only based upon the Complainant's failure to state reasonable grounds under the *Shroyer* Test, or demonstrate that she has suffered some injury.

{¶ 87} While we will dismiss the Complaint in this proceeding, we note that the Complaint fails to identify any specific harm suffered beyond general allegations of illegal disconnections or evictions, and we find that Complainant's claims regarding NEP's billing practices, or alleged violations of various state and federal credit reporting violations, do not merit further consideration in this proceeding, as we have determined that the provision of utility services at Creekside is not subject to this Commission's jurisdiction. We note that R.C. Chapter 5321 already regulates the practices of landlords, and includes protections for tenants. The Complainant's assertions regarding contractual relationships between NEP and the Creekside landlord do not, even if assumed to be true, change the fundamental landlord/tenant relationship over which this Commission is not the appropriate regulatory authority. Moreover, although we assume all of the Complainant's material allegations to be true, our analysis of this Commission's jurisdiction over the submetered arrangements provided by NEP and the Creekside landlord does not change. 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 provisions of the *Shroyer* Test. Accordingly, this complaint should be dismissed.

E. Knox's Motion to Sever

{¶ 88} With respect to Knox's motion to sever Count X of the Complaint, we note our findings above dismiss the Complainant's allegations regarding the provision of submetered natural gas service at Creekside since such service is provided directly by Knox pursuant to the Utility Addendum in the lease agreement (Complaint, Ex. 1 at 3, 36). As this

Complaint will be dismissed for failure to state reasonable grounds, we need not consider Knox's motion to sever Count X of the Complaint.

VII. ORDER

{¶ 89} It is, therefore,

{¶ 90} ORDERED, That AEP Ohio's motion to intervene be granted. It is, further,

{¶ 91} ORDERED, That the motions of NEP and Crawford Hoying to dismiss this Complaint be granted. It is, further,

{¶ 92} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

RMB/mef

Entered in the Journal

OCT 24 2018

Barcy F. McNeal

Barcy F. McNeal
Secretary

ATTACHMENT B

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
CYNTHIA WINGO,

COMPLAINANT,

V. CASE NO. 17-2002-EL-CSS

NATIONWIDE ENERGY PARTNERS, LLC,
ET AL.,

RESPONDENTS.

ENTRY ON REHEARING

Entered in the Journal on December 19, 2018

I. SUMMARY

{¶ 1} The Commission grants the Complainant's motion for leave to file a corrected application for rehearing of the Commission's October 24, 2018 Finding and Order, and grants such application for further consideration of the matters specified therein.

II. APPLICABLE LAW

{¶ 2} Pursuant to R.C. 4905.06, the Commission has general supervisory authority over all public utilities within its jurisdiction and may examine such public utilities and keep informed as to their general condition, to their properties, to the adequacy of their service, to the safety and security of the public and their employees, and to their compliance with all laws, orders of the Commission, franchises, and charter requirements. Under R.C. 4905.26, the Commission has authority to consider a written complaint against a public utility by any person or corporation regarding any rate, service, regulation, or practice affecting or relating to any service furnished by that public utility that is unreasonable, unjust, insufficient, or unjustly discriminatory or preferential.

{¶ 3} On October 24, 2018, the Commission issued a Finding and Order granting the motions of Nationwide Energy Partners, LLC (NEP), Crawford Hoying, Ltd. and Crawford Communities, LLC, to dismiss the complaint, and dismissing the complaint against Knox

Energy Cooperative Association, Inc. (Knox) sua sponte (Oct. 24, 2018 Order), finding that the Complainant had failed to meet her burden in alleging reasonable grounds for hearing as required by R.C. 4905.26. The complaint, filed on September 19, 2017 on behalf of Cynthia Wingo (Complainant or Ms. Wingo), generally alleges that the Respondents provide illegal submetered electric, water, sewer, and natural gas services to the Complainant's residence at the Creekside at Taylor Square apartments (Creekside) in Reynoldsburg, Ohio.

{¶ 4} On November 23, 2018, the Complainant filed an application for rehearing of the Oct. 24, 2018 Order. On November 26, 2018, the Complainant filed a motion for leave to file a corrected application for rehearing, with a request for an expedited ruling thereon.

{¶ 5} Memoranda contra the Complainant's application for rehearing were filed by NEP and Knox on December 3, 2018, and by Crawford Hoying on December 6, 2018.

III. DISCUSSION

{¶ 6} R.C. 4903.10 and Ohio Adm.Code 4901-1-35 provide that any party who has entered an appearance in a Commission proceeding may apply for rehearing of a Commission order with respect to any matters determined therein by filing an application for rehearing within 30 days after the entry of the order upon the Commission's journal.

{¶ 7} The Complainant's application for rehearing of the Oct. 24, 2018 Order, was timely filed on November 23, 2018, in accordance with R.C. 4903.10 and Ohio Adm.Code 4901-1-35. It lists two assignments of error: (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, 4905.26 and 4928.08; and (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 are unreasonable and unlawful under R.C. 4903.13.

{¶ 8} On November 26, 2018, the Complainant filed a motion for leave to file a corrected application for rehearing with a request for an expedited ruling thereon. The

Complainant seeks to correct grammatical mistakes and clerical errors on its application for rehearing and on pages i, 2-3, 9, 11-20 of its memorandum in support of the application.

{¶ 9} We note that the correction to the heading for the second argument of the second ground for rehearing (labelled as section B2 on page 16 of both the original and amended versions), reverses the meaning with the addition of the word "not" in the section heading. However, it is clear from the subsequent text, that the Complainant is requesting reversal of the Oct. 24, 2018 Order on the grounds that the Commission has failed to affirmatively identify the grounds for dismissal. As the identified mistakes and errors appear to be clerical in nature, and will not adversely or unfairly disadvantage any other party to this proceeding, the motion will be granted and the Complainant's application for rehearing will be considered as set forth in Exhibit B attached to the Complainant's Nov. 26, 2018 motion.

{¶ 10} Further, the Commission finds that Complainant's corrected application for rehearing of the Oct. 24, 2018 Order should be granted to allow further consideration of the matters specified therein.

IV. ORDER

{¶ 11} It is, therefore,

{¶ 12} ORDERED, That Complainant's motion for leave to file a corrected application for rehearing of the Oct. 24, 2018 Order be granted; and that such corrected application for rehearing be granted for further consideration of the matters specified therein. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

RMB/mef

Entered in the Journal
DEC 19 2018

Barcy F. McNeal
Secretary

ATTACHMENT C

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF CYNTHIA WINGO,

COMPLAINANT,

V. CASE NO. 17-2002-EL-CSS

NATIONWIDE ENERGY PARTNERS, LLC, ET AL.,

RESPONDENTS.

SECOND ENTRY ON REHEARING

Entered in the Journal on February 6, 2019

I. SUMMARY

{¶ 1} The Commission denies the Complainant's application for rehearing of the Commission's October 24, 2018 Finding and Order, which dismissed this complaint for failure to state reasonable grounds as required by R.C. 4905.26, as well as the Complainant's second application for rehearing of the December 19, 2018 Entry on Rehearing.

II. PROCEDURAL HISTORY

{¶ 2} This complaint was filed on September 19, 2017 on behalf of Cynthia Wingo (Complainant or Ms. Wingo), generally alleging that the Respondents, Nationwide Energy Partners, LLC (NEP), Crawford Hoying, Ltd. and Crawford Communities, LLC (jointly Crawford Hoying), and Knox Energy Cooperative Association, Inc. (Knox), provide illegal submetered electric, water, sewer, and natural gas services to the Complainant's residence at the Creekside at Taylor Square apartments (Creekside) in Reynoldsburg, Ohio.

{¶ 3} On October 24, 2018, the Commission issued a Finding and Order (Oct. 24, 2018 Order) dismissing the complaint against Knox, sua sponte, and granting the motions to dismiss of NEP, and of Crawford Hoying, in finding that the Complainant had failed to meet her burden of alleging reasonable grounds for hearing, as required by R.C. 4905.26.

{¶ 4} On November 23, 2018, the Complainant filed an application for rehearing of the Oct. 24, 2018 Order. On November 26, 2018, the Complainant filed a motion for leave to file a corrected application for rehearing. Memoranda contra the Complainant's application for rehearing were filed by NEP and Knox on December 3, 2018, and by Crawford Hoying on December 6, 2018.

{¶ 5} On December 19, 2018, the Commission issued an Entry on Rehearing granting Complainant's motion for leave to correct her application for rehearing of the Oct. 24, 2018 Order, and granting rehearing for further consideration of the matters specified therein.

{¶ 6} On January 18, 2018, the Complainant filed another application for rehearing, this time for rehearing of the Commission's December 19, 2018 Entry on Rehearing challenging the Commission's authority to grant rehearing for the purpose of further consideration of the matters specified therein (Dec. 19, 2018 Entry). In this second application for rehearing, Complainant contends that the Dec. 19, 2018 Entry refuses to affirmatively "grant or deny" rehearing of the matters raised in the application within the 30-day period prescribed by R.C. 4903.10. Therefore, the Complainant argues, the Commission's jurisdiction is forfeit.

III. DISCUSSION

{¶ 7} R.C. 4903.10 and Ohio Adm.Code 4901-1-35 provide that any party who has entered an appearance in a Commission proceeding may apply for rehearing of a Commission order with respect to any matters determined therein by filing an application for rehearing within 30 days after the entry of the order upon the Commission's journal.

{¶ 8} The Oct. 24, 2018 Order applied the Commission's traditional test for determining its jurisdiction over residential submetered service arrangements, first established *in re Inscho, et al. v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) at 2, 4-6, and affirmed modifications to the *Shroyer* Test

announced *in re the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI (*Submetering Investigation*) Finding and Order (Dec. 7, 2016) at ¶¶ 1, 16 and Second Entry on Rehearing (Jun. 21, 2017) at ¶¶ 40, 49-50. These modifications include a "Rebuttable Presumption" and "Relative Price Test" as well as two "Safe Harbor" exceptions to determine, on a case-by-case basis, whether a company which resells or redistributes a public utility service to a submetered residential customer (Reseller) should be subject to this Commission's jurisdiction under the third prong of the *Shroyer* Test, where provision of the utility service is ancillary to the landlord's primary business. The Oct. 24, 2018 Order applied the modified *Shroyer* Test to determine that none of the Respondents are operating as a public utility with respect to the submetered arrangements provided by NEP at Creekside. Oct. 24, 2018 Order at ¶¶ 1, 16, 74-78

{¶ 9} The Complainant's corrected application for rehearing of the Oct. 24, 2018 Order lists two assignments of error: (1) The Commission violated R.C. 4903.082, 4905.26 and 4928.08, by applying a modified *Shroyer* Test to prematurely adjudicate the claims and defenses raised in this proceeding on the merits; and (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 are unreasonable and unlawful under R.C. 4903.13.

A. Modification and Application of the Shroyer Test

{¶ 10} The Complainant's first ground for rehearing of the Oct. 24, 2018 Order alleges that the Commission prematurely adjudicated the Complainant's claims and defenses on the merits, and denied Complainant's rights to discovery and a hearing under R.C. 4903.082, 4905.26 and 4928.08, in affirming and applying the Rebuttable Presumption, Relative Price Test and Safe Harbors under the third prong of the modified *Shroyer* Test as affirmed by the Oct. 24, 2018 Order at ¶¶ 1, 16, 74-78. The Complainant then lists four arguments under this ground:

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

2. The Commission considered the allegations and defenses on the merits without allowing discovery or conducting a hearing.
3. *Shroyer* does not control whether the Complaint alleges reasonable grounds.
4. The "modified" *Shroyer* test is contrary to law.

{¶ 11} In support of its first assignment of error, the Complainant contends that the Commission must do four things before issuing its decision in this case: (1) ensure that it has subject matter jurisdiction to decide the claims alleged, pursuant to R.C. 4905.04; (2) find that the Complaint contains allegations, which if true, would support the finding that the rates, practices, or services complained of are unreasonable or unlawful, so as to constitute reasonable grounds under R.C. 4905.26; (3) allow the parties to pursue discovery under R.C. 4903.082; and (4) hold a hearing in accordance with R.C. 4905.26. The Complainant maintains that the Commission may not decide the case until all of these things happen, and 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, as required by R.C. 4903.09.

{¶ 12} In its memorandum contra, NEP accuses the Complainant of failing to acknowledge undisputed facts, including her own admission that she is paying standard service offer rates for electric generation service, and NEP's evidence showing that she actually has paid less than a similarly situated residential customer of AEP Ohio for electricity use at her apartment. NEP also disputes the Complainant's claim that the *Shroyer* Test "... is not the law" and "bears no relevance to the question of whether reasonable grounds for complaint have been alleged." NEP cites the *Submetering Investigation*, Second Entry on Rehearing (Jun. 21, 2017) at ¶ 19, 26, in arguing that this Commission possesses the authority to determine its own jurisdiction over an alleged public utility, in accordance with *Atwood Res. v. Pub. Util. Comm.*, 43 Ohio St. 3d 96, 98, 538 N.E.2d 1049, 104 P.U.R.4th 529

(1989) and that the use of the *Shroyer* Test in determining the Commission's jurisdiction has been expressly upheld by the Supreme Court of Ohio in *Pledger*, 109 Ohio St.3d 463, 466-69, 2006-Ohio-2989, 849 N.E.2d 14. Further, NEP argues that the dismissal of this complaint accords with nearly a century of Ohio Supreme Court precedent holding that a landlord is not a jurisdictional public utility, citing *Jonas v. Swetland Co.*, 119 Ohio St. 12, 162 N.E. 45 (1928), and *Shopping Ctrs. Assn. v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 32 O.O.2d 1, 208 N.E.2d 923 (1965) and that it is the landlord, not the tenant, who is the consumer where the landlord secures, resells, and redistributes electric service to its tenants. *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, and *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 466-69, 2006-Ohio-2989, 849 N.E.2d 14 at ¶ 35-38.

{¶ 13} NEP also challenges the Complainant's assertions that Counts II, III, VI, IX, X, and XI of the complaint do not depend on a respondent's status as being a public utility. NEP argues that our resolution of the Respondents' jurisdictional status under the *Shroyer* Test determines the entire Complaint. NEP notes that Count II of the complaint alleges that NEP provides "retail electric service" to the Complainant 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, NEP argues, as none of the Respondents in this case, including NEP, are jurisdictional public utilities, the Complainant is not a "consumer" of any retail electric generation service under the *FirstEnergy* and *Pledger* decisions. Moreover, NEP asserts, the Complainant cannot demonstrate the particularized harm necessary to maintain her claim, in accordance with the Court's holding *in re Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, 139 Ohio St.3d 284, 2014-Ohio-1532, 11 N.E.3d 1126.

{¶ 14} With respect to the Complainant's allegations of violations of the Certified Territory Act, NEP notes that the term "electric supplier" as used in R.C. 4933.81(A) is an "electric light company" as defined in R.C. 4905.03. Therefore, NEP reasons, without a threshold finding that NEP is a public utility and an "electric light company" under the *Shroyer* Test, NEP cannot be an "electric supplier" under the Certified Territory Act.

Similarly, NEP notes that Counts VI, IX, X and XI of the complaint assume a respondent's jurisdictional public utility status, while Counts VI and IX pertain to rules governing competitive retail electric service providers. However, NEP asserts, none of the Respondents in this case are providing any retail competitive electric service to Ms. Wingo, and she is not a "consumer" of such electric service under the holdings in *FirstEnergy*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485 and *Pledger*, 109 Ohio St.3d 463, 466-69, 2006-Ohio-2989, 849 N.E.2d 14.

{¶ 15} In its memorandum contra, Crawford Hoying notes that the Complainant has failed to allege any facts that implicate Crawford Hoying in any violation of Ohio law or Commission rule. Crawford Hoying also contends that it provided sufficient information in its motion to dismiss for the Commission to properly determine that Crawford Hoying is not operating as a public utility subject to Commission jurisdiction. Therefore, Crawford Hoying argues that since R.C. 4905.26 only applies to complaints against a "public utility," the Complainant is not entitled to a hearing because the Commission has determined that the Respondents in this case are not public utilities.

{¶ 16} Crawford Hoying also disputes the Complainant's contentions that the application of the *Shroyer* Test is premature, and that the Complainant is entitled to discovery and a hearing simply because she filed a complaint. Crawford Hoying notes the Complainant's own citations regarding our limited jurisdiction to hear complaints against public utilities under R.C. 4905.26, and contends that where a party to a case disputes the Commission's jurisdiction, the Commission is first obligated to establish that it does have jurisdiction. Crawford Hoying concludes that the Oct. 24, 2018 Order correctly determined that the Commission did not have jurisdiction over the Respondents in this case prior to holding a hearing that would ultimately turn out to be unnecessary.

{¶ 17} The Complainant's analysis of this issue is incorrect. If the Commission does not have subject matter jurisdiction to consider a complaint under R.C. 4905.04 and 4905.26, the complaint should be dismissed. No further discovery or hearing is necessary. The Oct.

24, 2018 Order correctly applied our traditional test for jurisdiction with respect to residential submetered arrangements, including the modifications developed in the *Submetering Investigation*, and we determined that this Commission should not exercise jurisdiction over the submetered arrangements provided by NEP at Creekside, even if we assume that all of the Complainant's material allegations are true. *Id.* at ¶¶ 74-78.

{¶ 18} The Complainant insists that she has alleged reasonable grounds for her complaint to be heard, and that the Oct. 24, 2018 Order renders no express finding to the contrary. Her reasonable grounds, however, must relate to a complaint as to service **against a public utility** to qualify for hearing under R.C. 4905.26. The Oct. 24, 2018 Order expressly dismissed her complaint for failure to state reasonable grounds as required by R.C. 4905.26 with respect to natural gas service at Creekside. *Id.* at ¶¶ 1, 56. Furthermore, the Order expressly found, after applying *Shroyer* Test, the Reasonable Price Test, and the Safe Harbor exceptions, that the Respondents were not public utilities with respect to the provision of submetered water, sewer, or electric services at Creekside. *Id.* at ¶¶ 1, 66-67, 78-79, 85-87.

{¶ 19} The Complainant argues that *Shroyer* does not control whether her complaint alleges reasonable grounds, and that the "modified" *Shroyer* Test is contrary to law. The Complainant contends that *Shroyer* is "not the law," "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.'" Corrected application for rehearing, Nov. 26, 2018 at 9.

{¶ 20} We disagree. Our resolution of the Respondents' jurisdictional status under the *Shroyer* Test determines all counts raised in the complaint. This Commission possesses the authority to determine its own jurisdiction over an alleged public utility. *Atwood Res. v. Pub. Util. Comm.*, 43 Ohio St. 3d 96, 98, 538 N.E.2d 1049, 104 P.U.R.4th 529 (1989). In the Complainant's corrected application for rehearing at 3-4, her argument begins with the statement that this Commission is a creature of statute, having only such power as the General Assembly has seen fit to confer upon it. *Coalition for Safe Elec. Power v. Public Util.*

Comm., 49 Ohio St.2d 207, 210, 361 N.E.2d 425 (1977) quoting *Cleveland v. Public Util. Comm.*, 127 Ohio St. 432, 435-436, 189 N.E. 5, 7. (1934). The Complainant then, however, fails to acknowledge the established case law that has developed in determining the power conferred upon this Commission by the General Assembly.

{¶ 21} The Oct. 24, 2018 Order contains, at ¶¶ 59-65, a discussion of the applicable case law beginning with the Supreme Court of Ohio's recognition that the statutory definitions in R.C. 4905.02 and 4905.03 are not self-applying to the landlord-tenant relationship. *Pledger*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 17, 26. The Order also notes that the meaning of "public utility," although sometimes elusive, has gradually evolved through case law (*A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 387, 596 N.E.2d 423, 1992-Ohio-23), and that the determination of whether a particular entity is a public utility is a mixed question of law and fact. *Marano v. Gibbs*, 45 Ohio St.3d 310, 311, 544 N.E.2d 635 (1989).

{¶ 22} As discussed at length below, the Oct. 24, 2018 Order correctly applied the *Shroyer* Test, and the Reasonable Price Test and Safe Harbor exceptions developed in the *Submetering Investigation* for residential submetered arrangements, to determine that none of the Respondents are operating as a public utility with respect to the submetered arrangements provided by NEP at Creekside. *Id.* at ¶¶ 74-78. If none of the Respondents are operating as public utilities, the Commission's jurisdiction to consider the complaint, pursuant to R.C. 4905.02, 4905.03, and 4905.26, must also end. This Commission is not a court and has no power to ascertain and determine legal rights and liabilities. *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144, 148, 980 N.E.2d 996, 2012-Ohio-5445 at ¶ 20, citing *State ex rel. Dayton Power & Light Co. v. Riley*, 53 Ohio St.2d 168, 170, 373 N.E.2d 385 (1978); and *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30-31, 132 N.E. 162 (1921). The Complainant is not entitled to further discovery and a hearing under R.C. 4905.26, if her complaint is not against a public utility.

{¶ 23} We also reject the Complainant's contention that the "modified" *Shroyer* Test is contrary to law. Our affirmation and application of the Reasonable Price Test and Safe Harbor exceptions for residential submetered arrangements in the Oct. 24, 2018 Order at ¶¶ 70-78, is consistent with the Commission's recent decisions in the *Submetering Investigation,* Fourth Entry on Rehearing (Jan. 9, 2019) at ¶¶ 31-32, 53, 56, 58, 60-61, 64, and in the Complainant's first case, *In re Wingo v. Nationwide Energy Partners, LLC,* Case No. 16-2401-EL-CSS, Third Entry on Rehearing (Jan. 9, 2019) at ¶¶ 35-36, 38-40, where the arguments of the Complainant or her counsel were previously considered and rejected. In this proceeding, the Complainant raises no new fact or legal theory to support her arguments.

{¶ 24} Moreover, we note that even without any modifications, this complaint would have been dismissed under the traditional *Shroyer* Test, which has been reviewed and upheld by the Supreme Court of Ohio. *Pledger,* 109 Ohio St.3d 463, 466-69, 2006-Ohio-2989, 849 N.E.2d 14. Accordingly, the Complainant's first assignment of error in this case is rejected.

B. Findings of Facts and Conclusions of Law

{¶ 25} The Complainant's second ground for rehearing of the Oct. 24, 2018 Order is that 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 are unreasonable and unlawful under R.C. 4903.13. The Complainant then lists six arguments under this assignment of error:

1. The Commission failed to engage in the fact-finding necessary to apply the modified *Shroyer* Test.
2. The Order does not affirmatively identify the grounds for dismissal.
3. The Order does not explain the basis for dismissal of claims that do not assert Respondents are public utilities.
4. The Order does not explain the basis for any finding of "agency."

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

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

{¶ 26} We reject Complainant's contentions that the Commission failed to engage in the fact-finding necessary to apply the modified *Shroyer* Test or affirmatively identify the grounds for dismissal. The Commission's review of the facts and law in this proceeding included a summary of the complaint's 11 counts, which cover more than 100 paragraphs, alleging the improper resale of electric, natural gas, water and sewer services at the Complainant's Creekside apartment. Oct. 24, 2018 Order at ¶¶ 24-38. The Order then summarized the Respondents' pleadings at ¶¶ 38-53, before considering the analysis of each service under the *Shroyer* Test.

{¶ 27} With respect to the provision of natural gas service at Creekside, the Order found that the Complainant is directly served by Knox through the Utility Addendum to her lease which authorized the landlord to secure gas service to the Complainant's apartment on her behalf. The Order noted that Knox is a non-profit cooperative association and the sole provider of natural gas distribution service at Creekside, and that Knox provides such service directly to its members through its own lines and meters, and bills its members directly for natural gas service based on readings from Knox's meter at the tenant's premises at the same rate that Knox charges all other Ohio residential members. Based on these factual admissions, the Order found that no resale or redistribution of natural gas service has occurred at Creekside and, thus, no need to apply the modified *Shroyer* Test to determine our jurisdiction over natural gas service at Creekside. Oct. 24, 2018 Order at ¶¶ 55-56.

{¶ 28} With respect to water and sewage services at Creekside, the Order noted the undisputed statements that NEP reads the submeters and pays the charges for the water and sewer services provided by the city of Reynoldsburg, and handles the billing and collection from Creekside tenants for such services. Further, the Complainant's lease

agreement requires that the water rates billed to residents must be similar to those rates charged by regulated utilities. The Order then reviewed the case law and *Shroyer* Test, and found no credible allegations or evidence that NEP, Crawford Hoying, or the Creekside property owners fail the first two prongs of the *Shroyer* Test. The Order cited credible evidence that the Creekside Landlord is merely passing through the cost of water and sewer service from the city of Reynoldsburg and finds that the provision of submetered water and sewer service at Creekside is ancillary to the landlord's operations under the third prong of the *Shroyer* Test and, therefore, should not be subject to Commission jurisdiction. Oct. 24, 2018 Order at ¶¶ 57-66.

{¶ 29} Finally, with respect to the Complainant's allegations regarding the provision of electric service at her Creekside apartment, the Order finds that such service also passes the first two prongs of the *Shroyer* Test, and qualifies for the second Safe Harbor exception because the electric usage rates which NEP billed to the Complainant did not exceed what the Complainant would have paid on an annual basis if she had been directly served under AEP Ohio's residential default rates. Accordingly, the Order deems the provision of submetered electric service at Creekside to be incidental to the landlord's operations under the third prong of the *Shroyer* Test and, therefore, not subject to Commission jurisdiction. *Id.* at ¶¶ 67-69, 75-78.

{¶ 30} As just noted above, the Oct. 24, 2018 Order clearly sets forth the operative facts and conclusions of law that support our decision. Moreover, it is well-settled that the party seeking reversal of a Commission order to bears the burden of demonstrating that it has been or will be harmed or prejudiced by the Commission's order shows that it by the order. *Buckeye Energy Brokers*, 139 Ohio St.3d 284, 287-289, 2014-Ohio-1532, 11 N.E.3d 1126, citing *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949), paragraph six of the syllabus; *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980), syllabus; *Myers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 302, 595 N.E.2d 873 (1992); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 12. Moreover, general allegations of inherent harm is not sufficient to meet a

complainant's burden of showing of harm or prejudice. "Case law is clear that an allegedly aggrieved party must show that it suffered prejudice from a commission order to warrant reversal." *Buckeye Energy Brokers,* at ¶ 22. The party seeking reversal must show harm to itself. *Id.* at ¶ 23, citing *Ohio Edison Co. v. Pub. Util. Comm.,* 173 Ohio St. 478, 184 N.E.2d 70 (1962), paragraph ten of the syllabus; *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.,* 140 Ohio St. 160, 42 N.E.2d 758 (1942), syllabus; *Indus. Energy Consumers v. Pub. Util. Comm.,* 63 Ohio St.3d 551, 553, 589 N.E.2d 1289 (1992).

{¶ 31} In this case, the Complainant bears the "burden of demonstrating * * * that it has been or will be prejudiced by the [Commission's] error." *Buckeye Energy Brokers,* at ¶ 24, quoting *AK Steel Corp. v. Pub. Util. Comm.,* 95 Ohio St.3d 81, 88, 765 N.E.2d 862 (2002). However, the Complainant has failed to identify any specific harm suffered or allege any facts that, if proven at hearing, would change the outcome of our analysis under the Safe Harbor provisions of the modified *Shroyer* Test. Oct. 24, 2018 Order at ¶ 87.

{¶ 32} The Complainant argues that the Oct. 24, 2018 Order fails to explain the basis for (1) dismissal of claims that do not assert that the Respondents are public utilities, (2) any finding of "agency" or (3) AEP Ohio's "obligation to serve." We find no merit in any of these arguments. As discussed above, a complaint brought under R.C. 4905.26 must relate to service **provided by a public utility**. This Commission is not a court and has no power to ascertain and determine legal rights and liabilities. *DiFranco,* 134 Ohio St.3d 144, 148, 980 N.E.2d 996, 2012-Ohio-5445 at ¶ 20. Moreover, the Oct. 24, 2018 Order made no express findings regarding the ownership or management of the Creekside apartments because no such findings were relevant or necessary in applying the modified *Shroyer* Test in this case. The identity of the corporate ownership and/or management of the Creekside apartments does not impact our analysis of the submetering arrangements at Creekside, and the Complainant has failed to show how she is prejudiced by such lack of findings.

{¶ 33} Finally, the Complainant claims that the Oct. 24, 2018 Order at ¶ 75, erroneously imposes new requirements on complainants seeking to assert the Relative Price

Test in future complaints by requiring any future complainants to provide both an actual bill and the amount the complainant would have paid for the same usage under the applicable public utility service. The Complainant argues that Ms. Wingo did not "assert" the Relative Price Test, and that the Commission cannot enforce this requirement because Commission orders are only binding on parties to the proceeding. The Complainant argues that such a requirement can only be imposed through a formal rule-making proceeding in accordance with R.C. 111.15(A)(1). This argument was considered and rejected in the *Submetering Investigation*, Fourth Entry on Rehearing (Jan. 9, 2019) at ¶¶ 13-23. The Relative Price Test is a method of analysis, not a procedural requirement, under the modified *Shroyer* Test which can be used to quickly indicate harm suffered by the tenant under a submetered arrangement. As we have directed the Commission's Staff and the appropriate local public utility to assist residential tenants receiving submetered service in developing comparisons for use in applying the Relative Price Test, we expect any burden upon the resident of providing the required data and analysis will be minimized. Further, Complainant's reliance on *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5789, ¶ 75, 111 Ohio St.3d 300, for the assertion that the modified *Shroyer* framework cannot apply to her because she was not a party to the *Submetering Investigation* is misguided. In *Pledger*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, the Supreme Court of Ohio upheld the Commission's denial of a motion for rehearing that was denied based on a legal framework developed in a case in which the complainant was not a party. *In re Inscho, et al. v. Shroyer's Mobile Homes,* Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992).

{¶ 34} As noted above, the issues raised by the Complainant in this case, at least with respect to NEP's operations, were also raised and rejected in the Commission's recent decisions in the *Submetering Investigation*, Fourth Entry on Rehearing (Jan. 9, 2019), and in the Complainant's first case, *In re Wingo v. Nationwide Energy Partners, LLC*, Case No. 16-2401-EL-CSS, Third Entry on Rehearing (Jan. 9, 2019). The Complainant's arguments on rehearing in this proceeding have also been considered by the Commission, and are rejected. Any arguments in support of the Complainant's assignments of error not specifically

discussed herein have been thoroughly and adequately considered by the Commission and are hereby denied. Accordingly, the Complainant's second assignment of error in this case is rejected, and the Complainant's application for rehearing of the Oct. 24, 2018 Order is denied.

C. *The Complainant's Second Application for Rehearing is without Merit*

{¶ 35} The Complainant's second application for rehearing asserts that the Commission's jurisdiction is now forfeit because the Dec. 19, 2018 Entry refused to affirmatively "grant or deny" rehearing of the matters raised therein within the 30-day period proscribed by R.C. 4903.10. The Complainant contends that she was denied due process as a result of the delay inherent in the Commission's practice of granting rehearing for the purpose of permitting itself more time to consider issues raised on rehearing. The Complainant cites *State ex rel. Consumers' Counsel v. Public Util. Comm.*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, where the Ohio Consumers' Counsel (OCC) had requested the Court to issue a writ of prohibition to stop this Commission from granting certain applications for rehearing. The Complainant then argues that entries which merely grant additional time have no legal effect, and that *Consumers' Counsel* was wrongly decided.

{¶ 36} The Complainant observes that "The practice of granting rehearing for 'further consideration' seems to have evolved from dicta in the 2004 *Consumers Counsel* decision." Complainant's second application for rehearing at 2. The Complainant is again wrong. The Commission's practice of granting rehearing to allow itself further time to consider issues raised on rehearing certainly predated the Court's 2004 decision. See, e.g., *In re Application of Toledo Edison Co., et al.*, Case No. 95-299-EL-AIR, et al., Entry on Rehearing, Jun. 6, 1996, 1996 WL 34606327; *In re Conjunctive Electric Service Guidelines*, Case No. 96-406-EL-COI, Entry on Rehearing, Feb. 20, 1997, 1997 WL 34878864; *In re the Commission's Investigations into Telephone Number Assignment Procedures, and Exhaust Relief for Area Code 330*, Case Nos. 97-884-TP-COI and 99-669-TP-COI, Entry on Rehearing, Dec. 21, 1999, 1999 WL 1489380; *In re Subscribers of the Middletown Exchange v. Ameritech Ohio and Cincinnati Bell*

Telephone Co., Case No. 98-357-TP-PEX, Entry on Rehearing, May 21, 2002, 2002 WL 34924436; *In re David Miller v. SBC Ohio*, Case No. 01-469-TP-CSS, Entry on Rehearing, May 8, 2003, 2003 WL 21047826; and *In re Ameritech Ohio*, Case No. 96-922-TP-UNC, Entry on Rehearing, May 14, 2003.

{¶ 37} The Complainant is also wrong, factually and legally, in asserting that her first corrected application for rehearing was denied by operation of law. The Dec. 19, 2018 Entry did affirmatively grant rehearing in accordance with R.C. 4903.10, as the Commission is required to do if more than 30 days are desired to consider the issues raised. The Complainant asserts that the Courts interpretation of R.C. 4903.10 in *Consumers' Counsel*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, is dicta, and should not control our interpretation in this case. There, the Court held that OCC's request for a writ to prohibit the Commission from granting two applications for rehearing was moot since the Commission had already denied the applications for rehearing before the Court acted upon the OCC's request. *Id.*, at ¶ 12.

{¶ 38} The Court has already rejected the claim that the Commission cannot grant rehearing to further consider the applications for rehearing. *Consumers' Counsel*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, at ¶ 19. See, also *In re Applications of the Dayton Power and Light Co.*, Case No. 16-395-EL-SSO, et al., Second Entry on Rehearing (Jan. 31, 2018) at ¶¶ 15-16. The Dec. 19, 2018 Entry clearly granted rehearing within the 30-day period proscribed by R.C. 4903.10. The Complainant has failed to identify any precedent that would validate her interpretation of R.C. 4903.10. Moreover, the Complainant has failed to identify any prejudice or harm suffered as a result of any delay in addressing the substantive issues in her case. Accordingly, the Complainant's second application for rehearing of the Dec. 19, 2018 Entry is also denied.

IV. ORDER

{¶ 39} It is, therefore,

{¶ 40} ORDERED, That both the Complainant's Second application for rehearing of the Oct. 24, 2018 Order, and the Complainant's second application for rehearing of the Dec. 19, 2018 Entry be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrenee K. Friedeman

Daniel R. Conway

RMB/mef

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Secretary