

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Investigation )  
of Submetering in the state of Ohio. )

Case No. 15-1594-AU-COI

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
COMMENTS**

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Ohio Partners for Affordable Energy ("OPAE") herein submits to the Public Utilities Commission of Ohio ("Commission") these comments in the above-captioned Commission-ordered investigation of sub-metering in the state of Ohio. In its Entry initiating the investigation, the Commission cited the complaint in Case No. 15-697-EL-CSS against Nationwide Energy Partners, LLC ("NEP") in which Mark A. Whitt, the complainant, alleges that NEP is unlawfully operating as a public utility and charging unjust and unreasonable rates. The complaint asks the Commission to consider whether NEP, a company that "resells" public utility services to customers, is acting unlawfully as a public utility as defined by Revised Code Section 4905.02(A) without being a public utility. The Commission will also review whether the rates being charged by NEP are unjust and unreasonable in violation of R.C. 4909.18 and R.C. 4905.22, which require that "no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service." The Commission has a duty to "[e]nsure the availability to consumers of ...reasonably priced retail electric service." R.C. 4928.02(A).

OPAE intervened in Case No. 15-697-EL-CSS to protect the interests of low and moderate-income customers and OPAE nonresidential-customer members whose provision of electric service might be affected by the complaint. The interests of low-income residential and nonresidential customers might be "adversely affected", when the Commission determines whether NEP is acting

unlawfully as a public utility—and an unlawful public utility that is charging unjust and unreasonable rates.

The Commission initiated this investigation after it denied OP&E's motion to intervene in the Whitt complaint. Entry, Case No. 15-697-EL-CSS (November 18, 2015) at 5-6. The Commission found that OP&E's interests should be addressed in this investigation docket rather than in the Whitt complaint. Id.

In pleadings in the Whitt complaint, intervenors referenced *Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, Opinion and Order (February 27, 1992) and another Commission complaint, *Brooks, et al. v. Toledo Edison Co.*, 1996 Ohio PUC Lexis 292 (May 8, 1996). These complaints involve situations where the utility account is in the name of a landlord who bills tenants for their usage. The question then is whether this situation makes the landlord a public utility. The precedents state the obvious: that a public utility serves the general public which has a legal right to receive the service. In arrangements where a tenant receives electricity from an entity that does not offer electricity to the general public, the entity is not a public utility. The landlord is not a public utility. The Commission's investigation is to consider whether the activities of entities such as NEP have made precedents such as *Shroyer's* and *Brooks* inadequate to address the relevant issues.

The Entry asks for comments on questions that are addressed in *Shroyer's*: The first question is whether condominium associations and similarly situated entities, including third-party agents of these entities, are public utilities pursuant to the Commission's test in *Shroyer's*, which asks if a manufactured home park: 1) has manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant to 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) made the

service available to the general public rather than just to tenants residing in the home park; and 3) provided utility service ancillary to its primary business of operating a manufactured home park. This first question simply describes the *Shroyer's* test under which the landlord is obviously not a public utility. The next questions ask if there are situations in which the *Shroyer's* test cannot be applied, and if so, what test should the Commission apply and what impacts to customers and stakeholders would there be if the Commission were to assert jurisdiction over sub-metering in the state of Ohio.

The Commission's investigation is asking whether *Shroyer's* is now inadequate to address the activities of entities such as NEP. Yes, *Shroyer's* is inadequate. In Reply to NEP's Memorandum Contra OPAE's Motion to Intervene in the Whitt complaint, OPAE noted that, according to the complaint, NEP was issuing bills to the complainant and all other residents belonging to the condominium association for electric, water, and sewer service on a monthly basis. The electric charges billed by NEP separately listed generation, transmission, and distribution components of retail electric service. NEP also assessed a customer charge. NEP was billing for electric distribution service even though NEP has no certified territory in which to provide electric distribution service. NEP was also billing for electric generation service even though NEP is not a certified competitive retail generation supplier. NEP was billing for public utility and generation service like a public utility or a certified generation supplier but was neither of these. Therefore, NEP was acting as a public utility without being one.

The problem is that customers have little or no power to confront these situations. It may be argued that customers voluntarily enter into these arrangements by signing a lease or joining a condominium association. However, the arrangement appears to be an adhesion contract, which is defined

as “a standardized form contract prepared by one party, and offered to the weaker party, usually a consumer, who has no realistic choice as to the contract terms.” *Taylor Bldg. Corp. of Am. V. Benfield*, 117 Ohio St. 3d 352 ¶48, citing Black’s Law Dictionary (8<sup>th</sup> Ed. 2004). Customers may not be aware that they are surrendering their right to public utility service with the consumer protections that are attendant to this status. The assertion that these are voluntary arrangements freely entered into by customers is not credible. Under these arrangements, unless a consumer signs away his or her rights to be a public utility customer, he or she is denied the right to live or work in the location of his or her choosing. In these arrangements, customers are subject to the charges of a billing agent, not the charges of a public utility. Public utility service is unavailable to these customers.

Because public utilities such as Ohio Power Company, the electric distribution utility in the area where Whitt’s condominium association and NEP operate, have exclusive rights to provide electric distribution service in their certified territories to customers in the territory, the customers should be able to obtain public utility service directly from the public utility. The Commission recognized this when it granted AEP Ohio’s intervention in the Whitt complaint by stating that regardless of any determination the Commission may make about who the customer of electric service is in the Whitt complaint, Ohio Power Company has the exclusive right to provide retail electric service to that customer. Entry, Case No. 15-697-EL-CSS (November 18, 2015) at 6-7.

The Commission should show the same concern for the rights of customers that it shows for the rights of the utility. An association or a landlord may be able to arrange for utility service to customers through a contract and sub-metering arrangement. However, a customer should not lose his or her rights to be served by the public utility which is authorized to serve the area in

question because of a provision in a lease or condominium agreement. The Commission should recognize the right of consumers to be a customer of a public utility. R.C. 4928.02(A).

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of these Comments was served on the persons stated below via electronic transmission this 21st day of January 2016.

/c/Colleen Mooney  
Colleen L. Mooney

### **SERVICE LIST**

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Summary: Comments of Ohio Partners for Affordable Energy electronically filed by Colleen L Mooney on behalf of Ohio Partners for Affordable Energy