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

OHIO PARTNERS FOR AFFORDABLE ENERGY'S REPLY COMMENTS

I. Introduction

Ohio Partners for Affordable Energy ("OPAE") herein submits to the Public Utilities Commission of Ohio ("Commission") these reply comments in the above-captioned Commission-ordered investigation of submetering 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 ("R.C.") Section 4905.02(A). 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).

In pleadings in the Whitt complaint, intervenors referenced *Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, Opinion and Order (February 27, 1992) ("*Shroyer*"), in which the Commission considered situations where the utility account is in the name of a landlord who bills tenants for the service. The precedent is that a 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* inadequate to address current circumstances.

The Commission clearly possesses the authority to protect residential customers in submetering situations. R.C. 4905.04 authorizes the Commission to regulate submetering. Ohio Administrative Code ("O.A.C.") Rule 4901:1-18-02, which defines the application of rules authorized by the statute, includes the following:

> (A) (t)he rules in this chapter apply to all electric, gas, and natural gas utility companies that provide service to residential customers, including residential consumers in master-metered premises, and residential consumers whose utility services are included in rental payments.

Customers that live in residences that are submetered must be notified when the landlord fails to pay its bill and is scheduled for disconnection. O.A.C. 4901:1-18-08 defines the notice requirements in detail. The same legal authority that supports the rules can also justify the extension of regulatory power to provide additional protections to consumers.

Several public housing authorities have ceded their utility infrastructure to natural gas distribution utilities because when the gas is billed at the master meter, the distribution lines that deliver gas to submetered apartments are subject to safety regulations, and many housing authorities cannot afford the long-term costs of maintenance or the liability insurance. Regulatory authority, in the form of safety regulations, has clearly been asserted over these submetering arrangements. Consumers are entitled to safety and consumer protections when access to essential energy services is the issue.

II. Ohioans subjected to submetering arrangements are not afforded the protections of the law.

The electric distribution utilities Ohio Power Company ("AEP Ohio"), Duke Energy Ohio, Inc. ("Duke"), and The Dayton Power and Light Company ("DP&L") comment that submetering causes substantial harm to end-use utility customers by denying them critical protections and benefits afforded to customers of public utilities under Ohio law. The list of protections and benefits denied is quite long.

Submetered rates are hidden from customers and subject to no public oversight. AEP Ohio-Duke Comments at 5. Submetered customers often have no way of knowing what their utility charges will be because submetered rates are not set pursuant to public hearings and submetered public tariffs do not exist. Cost allocations can be based on square footage and include a share of common area costs. No due process exists for submetered customers to provide input into their utility rates or to complain about charges. AEP Ohio-Duke Comments at 8. There is no government oversight of any kind and no opportunity for customers to be heard. Nothing stops a submetering entity from setting rates that are unjust, unreasonable or discriminatory. Id. at 9. Submetering landlords and companies can hide the true cost of living in a submetered premise. A landlord can entice tenants with a low monthly rent and then make up considerable additional compensation by charging high utility rates that are hidden from customers and public oversight. If one tenant does not pay, other tenants may be forced to pick up that tenant's share.

Regulated utilities may not charge rates that are unjust, unreasonable or discriminatory. Regulated utilities are permitted to disconnect service only for certain expressly enumerated reasons. O.A.C. Rule 4901:1-18-03. Regulated utilities are required by statute to provide reasonable prior notice of disconnection. R.C. 4933.122(A). For residential customers, the Commission

requires that utilities provide at least fourteen days' written notice prior to disconnection and a personal visit. O.A.C. 4901:1-18-06(A). There are specific requirements for the information contained in a disconnection notice and requirements as to when disconnection may occur. AEP Ohio-Duke Comments 10-12. Residential customers receiving utility service through submeters lack these protections. Submetered customers also lack medical certification protection to avoid disconnection. There are no rules on when reconnection of service must occur.

Submetered customers lack any ability to enter into Commission-mandated payment plans. They lack the ability to enter into income adjusted payment plans. Id. at 13. They are unable to qualify for the Percentage of Income Payment Plan ("PIPP") and the Home Energy Assistance Program. DP&L Comments at 3.

Submetered service may also be unreliable. Developers may attempt to save costs by installing equipment that would not meet reliability standards to which public utilities are subject. AEP-Ohio-Duke Comments at 14. Submetered customers lack the protection of O.A.C. 4901:1-10, the Electric Service and Safety Standards. When there is an outage, submetered customers may be unable to identify which entity to contact and whose equipment needs repair. DP&L Comments at 5.

Submetered customers are denied the right to shop for competitive generation supply and cannot take advantage of government aggregation or competitive Standard Service Offer ("SSO") procurement. AEP Ohio-Duke Comments at 2. This is at odds with the state policy at R.C. 4929.02(B) that ensures the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, and conditions they elect to meet their needs and R.C. 4929.02(C) that ensures diversity of electric supplies

and suppliers by giving consumers effective choices over the selection of those supplies and suppliers. Submetered consumers have no effective choices.

Growth in the submetering business could adversely affect the distribution service revenues of regulated electric distribution utilities to a point where costs are shifted to remaining regulated utility customers in order to keep utility distribution service reliable and operational. DP&L Comments at 6. Therefore, submetering businesses harm customers of regulated utilities as well.

OPAE agrees with these comments of the electric distribution utilities Ohio Power, Duke, and DP&L. Being a public utility in Ohio brings privileges and also responsibilities. Submetering businesses are in a sweet spot where the privilege to operate a monopoly utility business from which customers cannot escape comes with no responsibility to protect and benefit customers like a public utility is required to do under Ohio law. The Commission must address this serious flaw in the current interpretation of the law.

III. If a submetering company is not a public utility, it must not be allowed to perform public utility functions.

In initial comments, OPAE argued that a submetering company like NEP is acting like a public utility without being one. By this, OPAE means that NEP's business activities involve providing public utility service without being subject to public utility regulation. These activities are unlawful and should cease. Under these sub-metering arrangements, residents are not only deprived of the right to shop for competitive gas and electric service and the right to statutory and administrative consumer protections, but are subjected to onerous and unfair terms of service from which there is no escape. Whitt Comments at 18.

Other comments recognize a catch in the argument. If submetering companies are not considered public utilities, the Commission will have no jurisdiction to hear complaints about them or to regulate their activities. The Office of the Ohio Consumers' Counsel ("OCC") and the Appalachian Peace and Justice Network ("APJN") argue that submetering entities should be considered public utilities. Considering NEP, NEP provides metering, billing and electric distribution services so that it should be considered a public utility. In the Whitt complaint, NEP is behaving like a public utility while simultaneously bypassing all of the conditions imposed by law that make an entity subject to the supervision of the Commission.

It would take a detailed review of utility billing records and further research to determine how many low-income customers live in submetered apartments. Staff of OPAE's member agencies, which handle intake and benefit determination for the Winter Crisis and PIPP programs, see clients who are facing eviction because of unpaid submetered bills. We have to find other sources to assist them because the federal and state assistance programs are not available. Intake workers also see customers that have individual meters for natural gas, but are submetered for electricity, and vice versa. It is ironic that a customer may have protections for one utility yet none for the other.

A Commission finding that a submetering or reselling entity's conduct rises to the level of a public utility would provide numerous consumer protections. The Commission could benefit consumers by assuming jurisdiction of submetering

and adopting consumer protections for consumers subject to exorbitant submetering charges and fees. Id. at 20. OPAE agrees with these comments.

On the other hand, the *Shroyer* test is clearly flawed and needs revision. *Shroyer* is circular because it asks whether the entity has manifested an intent to be a public utility; if the entity has not, it is not a public utility. A submetering entity will manifest no intent to be a public utility; therefore, it is not one under *Shroyer*. *Shroyer* unfairly stacks the deck against the party asserting a particular entity should be treated as a public utility. OCC-APJN Comments at 9. The entity is acting like a utility but is able to bypass all the conditions imposed by law that make the entity subject to the supervision of the Commission. This circular nature of *Shroyer* means that it is not probative in establishing an entity's status as a public utility. Id. at 10.

The *Shroyer* test is too narrow because it is inattentive to the monopolistic characteristics exhibited by submetering or reselling entities. Id. at 12. *Shroyer* does not address whether the submetering or reselling entities occupy a monopoly position. If a resident has no choice as to the supplier and must establish a relationship with a submetering entity, there is a monopoly. Unlike regulated public utilities, there is no ceiling on what the submetering entities may charge. The submetering entities are enjoying the benefits granted a public utility while evading the oversight that comes with that status. Id. at 13.

Duke and AEP Ohio propose that the Commission revisit *Shroyer* and establish a new test for defining a "public utility" that identifies submetering arrangements as public utilities. Any entities that charge for the supply of

electricity to end-use customers would be electric utilities. Landlords, condominium associations, and submetering companies that meter utility service and assess usage-based charges to end-use tenants or condominium owners are acting as public utilities. AEP-Ohio-Duke Comments at 25-26. Even without a certified territory, submetering entities would be subject to Commission regulation. If regulation puts them out of business, it is only because they charge unlawful higher rates and need not comply with the many legal requirements that apply to regulated public utilities. Id. at 26. Law enforcement and regulators regularly close illegal businesses. AEP Ohio and Duke argue that if the Commission curtails unregulated submetering, it would benefit all customers except for those landlords and submetering companies that have profited from customers by charging for utility service without being subject to Ohio utility law or Commission regulation. Id. at 30.

The Commission created the *Shroyer* test and the Commission has the authority to alter or amend it. AEP Ohio-Duke Comments at 21. The Supreme Court accepted the *Shroyer* test but only as the Commission's expert interpretation of R.C. 4905.03, which defines the various public utilities. Deference was given to the Commission to interpret the statute due to the Commission's expertise. Just as the Commission developed the *Shroyer* test to implement R.C. 4905.02 and 4905.03, the Commission should now find that the *Shroyer* test is inadequate to deal with the current situation.

The Commission should revisit *Shroyer* and, if the Commission's finding is appealed, the Court may again defer to the Commission's expertise. When the

Commission finds that submetering harms utility customers in numerous ways by denying them the benefits and protections afforded customers of regulated public utilities under Ohio law, the Commission will be able to convince the Court that its expertise resulted in a revision of the *Shroyer* test to take account of current unregulated submetering activities.

IV. Some existing submetering arrangements may be accommodated if those arrangements do not negate customer rights.

The Ohio Apartment Association ("OAA") and International Council of Shopping Centers ("ICSC") represent residential and commercial landlords who support the current *Shroyer* test under which they are not public utilities. OAA-ICSC Comments at 1. They believe that submetering allows landlords to more accurately assess and bill each tenant for his individual usage of utility services. Id. at 4. They argue that submetering solves inequities by ensuring that no tenant is over or undercharged and that the landlord has sufficient funds to cover costs, apparently by charging some tenants for nonpayment of other tenants. Id. This is not persuasive. OAA-ICSC argue that if they were to be considered public utilities, submetering would cease and the cost of utilities would be included within the rent. If this were true, at least the renter would know in advance what he would be charged.

The Building Owners and Managers Association of Greater Cleveland ("BOMA Cleveland") also comment that, as landlords, they are consumers of utility service, and not public utilities. BOMA Cleveland Comments at 3. They argue that the inability to sub-meter tenants would require substantial changes to the internal electric distribution infrastructure of the majority of buildings used for office purposes in Northeast Ohio. These buildings have had existing electric infrastructure in place for more than 50 years. Commission jurisdiction would create interference with the prevailing contract between tenant and landlord. Id.

at 4. Likewise, the Industrial Energy Users-Ohio ("IEU-O") argue that the Commission has not asserted jurisdiction over privately arranged shared service agreements and that the Commission should draw narrowly any claims of jurisdiction regarding submetering so that shared service arrangements used by industrial and other customers are not drawn under Commission regulation. IEU-O Comments at 10.

The Utility Management and Conservation Association ("UMCA") argues that the activities of NEP are different from its submetering activities. UMCA members do not own and maintain utility infrastructure, do not restore service during an outage, do not turn off service due to lack of payment, and do not profit from spreads between rates. UMCA Comments at 4. UMCA argues that the Commission should distinguish between the practices of the majority of submetering companies and NEP. The Commission may seek to address the consumer protection issues that can exist when an "outlier" submetering company owns, operates, and maintains utility infrastructure and handles service restoration. UMCA argues that the Commission should fashion a precise remedy that is limited to those instances. Id. at 14.

On contrast to these comments by BOMA Cleveland, IEU-O, and UMCA, NEP's comments do not evince any recognition that NEP is different from other submetering entities. According to NEP, there is no urgency for the Commission to expand its jurisdiction to cover submetering arrangements. NEP Comments at 8. NEP argues that the General Assembly has not expanded the Commission's jurisdiction to cover submetering and that the Commission may not expand its own jurisdiction. NEP argues that if the Commission assumes jurisdiction, an unknown number of buildings would be affected and numerous private property and contractual rights would be affected as well. The Commission would be

inserting itself into the landlord-tenant relationship and would be violating Ohio law. Id. at 9-10.

Mark Whitt, the complainant against NEP in Case No. 15-697-EL-CSS, comments that under Ohio law public utility status is a case-specific inquiry into the character of the business. *Shroyer* reflects a case-specific inquiry into the service at issue in the specific case. The service companies like NEP provide is materially different from the landlord service examined in *Shroyer*. *Shroyer* does not resolve the issues in the Whitt complaint. Whitt Comments at 4-10. Mr. Whitt argues that framing the issue as whether the Commission should "assert jurisdiction over submetering" assumes that "submetering" is different from "public utility" service and answers itself because the General Assembly has not defined "submetering" and has not given the Commission jurisdiction, the Commission lacks authority to "assert jurisdiction" over "submetering". Id. at 18. This is again the circularity of the argument. The question should be whether NEP's business (whatever it is called) meets the statutory definition of a public utility. NEP pays developers to allow it to install utility infrastructure and meters at their developments, arrange for the supply of utility service to these developments, and bills and collects for that service directly from the residents who end up renting or buying a unit. Id. Residents are locked into a relationship with NEP from which there is no escape, other than to move and sell. Residents are deprived of the right to shop for competitive gas and electric service, and are subject to onerous and unfair terms of service, including terms that NEP cites in court to evict tenants from their homes for nonpayment of utility bills. Whitt Comments at 18-19. NEP refers to itself as a "utility" at times but also denies that it is a utility when it seeks to avoid regulation. Id. at 19.

Shroyer is inadequate to address the activities of entities such as NEP. NEP is issuing bills to all residents belonging to a condominium association for

electric, water, and sewer service on a monthly basis. The electric charges billed by NEP separately list generation, transmission, and distribution components of retail electric service. NEP also assesses a customer charge. NEP is billing for electric distribution service even though NEP has no certified territory in which to provide electric distribution service. NEP is also billing for electric generation service even though NEP is not a certified competitive retail generation supplier. NEP is billing for public utility and generation service like a public utility or a certified generation supplier but is neither of these. Therefore, NEP is acting as a public utility without being one. If NEP is allowed to perform these functions, NEP should be considered a public utility.

Submetered customers have little or no power to confront submetering situations. Customers may voluntarily sign a lease or join a condominium association, but they should not be required to surrender their right to public utility service with the consumer protections that are attendant to this service. 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 operate a business in the location of his or her choosing. In these arrangements, if the entity providing the service is not a public utility, public utility service is unavailable to these customers. While it may be true that some accommodation of existing submetering arrangements may be necessary, this need for accommodation should not be the basis for Commission inaction. AEP Ohio and Duke comment that, under certain circumstances, they would not oppose reasonable accommodations for existing landlord and submetering companies as a means of transitioning away from submetering. OPAE agrees that some transition arrangements may be necessary, but activities by entities such as NEP must not be tolerated.

V. Conclusion

The Commission developed the *Shroyer* test to determine whether a submetering entity is a public utility. The Commission must now revise the *Shroyer* test to address the issues raised by current submetering. The Commission also clearly possesses the authority to protect residential customers in submetering situations. Customers subjected to submetering should enjoy all the rights and protections of customers of regulated public utilities. Consumers should be able to obtain public utility service directly from a public utility. 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 Reply Comments was served on the persons stated below via electronic transmission this 5th day of February 2016.

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