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

FINDING AND ORDER

Entered in the Journal on December 7, 2016

I. SUMMARY

{¶ 1} The Commission expands application of the *Shroyer Test* to condominium associations, submetering companies, and other entities. Further, the Commission creates new parameters for application of the *Shroyer Test* to determine if those entities are acting as public utilities when they resell or redistribute utility services. Additionally, the Commission clarifies 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.

II. PROCEDURAL HISTORY

{¶ 2} On December 16, 2015, the Commission initiated an investigation regarding the proper regulatory framework to be applied to submetering and condominium associations in the state of Ohio. 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. Further, the power to inspect includes the power to prescribe any rule or order that the Commission finds necessary for protection of the public safety.

{¶ 3} As the Commission noted in its Entry initiating this investigation, the Commission has historically applied a three-part test to determine if an entity is operating as a public utility and falls within the scope of the Commission's exclusive jurisdiction.

The three-part test, first adopted by this Commission in *Shroyer*, and affirmed by the Supreme Court of Ohio in *Pledger*, (*Shroyer Test*) is as follows:

(a) 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?

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

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

{¶ 4} We initially applied the *Shroyer Test* to waterworks companies, but it can be applied to the provision of any public utility service. *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992); *In re Pledger*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004); *Pledger v. PUC*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶18; *In re Brooks*, Case No. 94-1987-EL-ATA, Opinion and Order (May 8, 1996); *In re FirstEnergy*, Case No. 99-1212-EL-ETP, et al., Entry (Nov. 21, 2000); *FirstEnergy Corp. v. PUC*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶10, 18.

{¶ 5} While the Commission has a long history of applying the *Shroyer Test*, the Commission requested comments regarding whether the *Shroyer Test* should continue to be applied and whether it can effectively be applied to condominiums. Comments from interested stakeholders were filed on January 21, 2016, and reply comments on February 5, 2016.

{¶ 6} The Commission received initial comments on January 21, 2016, from The Dayton Power and Light Company (DP&L), Ohio Power Company (AEP Ohio), Duke Energy Ohio, Inc. (Duke), The East Ohio Gas Company (Dominion), the Ohio Consumers' Counsel (OCC) and Ohio Poverty Law Center (OPLC), Direct Energy, Interstate Gas Supply, Inc. (IGS), Industrial Energy Users – Ohio (IEU-Ohio), the Ohio Apartment Association (OAA), the International Council of Shopping Centers (ICSC), the Building Owners and Managers Association of Greater Cleveland (BOMA Cleveland), Ohio Partners for Affordable Energy (OPAE), the Utility Management and Conservation Association (UMCA), Nationwide Energy Partners (NEP), Mark Whitt, and various consumers. Thereafter, reply comments were filed by the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy), OCC, NEP, Mark Whitt, UMCA, One Energy, AEP Ohio, Duke, BOMA Cleveland, OPAE, IEU-Ohio, ICSC, and OAA. The Commission reviewed each of the comments and reply comments filed in this case and found them to be informative and helpful.

{¶ 7} Additionally, this is not the first time we have requested comments on the issues of submetering and redistribution of utility services. In conducting our investigation in this case, we also reviewed the comments filed by Simon Property Group, FirstEnergy, Ohio Building Owners and Managers Association, Columbus Southern Power Company, Ohio Power Company, IEU-Ohio, Enron Energy Services, General Growth Properties, and The Appalachian People's Action Coalition filed on December 6, 2000, and the reply comments filed on December 13, 2000, in Case No. 99-1212-EL-ETP. *In re FirstEnergy*, Case No. 99-1212-EL-ETP, Entry (Nov. 21, 2000) at Finding 9. Pursuant to our review of the significant number of comments and reply comments, the Commission has now conducted a complete and thorough review of submetering in the state of Ohio and issues this Finding and Order to provide guidance to Ohio's public utilities and interested stakeholders.

III. DISCUSSION

{¶ 8} Initially, the Commission recognizes the comments of the UMCA regarding the different means of submetering. The UMCA explains that UMCA members facilitate submetering but are not connected with construction of utility infrastructure at a property, do not attempt to recover any associated construction costs for utility infrastructure, and allow the relevant local public utility to address all service restoration and termination issues consistent with Commission rules. The UMCA notes that submetering typically includes a company providing meter reading and billing for a multi-family property owner to accurately allocate utility services consumed among the residents of the property, but does not include owning or operating utility infrastructure as a local distribution utility would. The UMCA asserts that serious consumer protection gaps exist when a submetering company owns and operates utility infrastructure, thereby acting as the local distribution utility. The UMCA believes that these gaps are present solely due to the conscious business decisions made by certain unregulated companies to own, operate, and assume responsibilities traditionally left to regulated local distribution utilities.

{¶ 9} Similarly, Direct Energy and IGS assert the Commission should recognize the differences between competitive retail electricity market issues and submetering issues. They assert submetering is not the supply of electricity, rather it is a situation in which a landlord or building owner bills its tenants for the power purchased for the property. They aver the purpose of submetering often isn't solely to recover costs for the energy use by an individual tenant but also for common areas. Further, Direct Energy and IGS assert the Commission should establish new administrative rules to implement its determination in this case. They note that such rules could include consumer disclosure requirements for submetering to protect the public interest.

{¶ 10} IEU-Ohio argues the Commission must determine whether it has jurisdiction over an entity on a case-by-case basis. IEU-Ohio asserts the application of the legal framework to determine if an entity, or its agent, is subject to Commission jurisdiction must be based on a review of the facts and circumstances presented by the particular activities of the entity or its agent. According to IEU-Ohio, under Ohio law, there is no categorical answer to the question of whether condominium associations or similarly situated entities, including their agents, are public utilities subject to Commission jurisdiction. The Supreme Court of Ohio and the Commission have both recognized that factual differences matter, and the Commission cannot simply label something as a utility service to support a determination that a particular arrangement should be subject to and receive the benefits of public utility status. Further, IEU-Ohio notes that historically the Commission has not asserted jurisdiction over privately arranged shared service agreements. *See In re Procter & Gamble Co.*, Case No. 03-725-HC-ARJ, Entry at 2 (Apr. 10, 2003). Therefore, IEU-Ohio asserts the Commission should narrowly draw any claims of jurisdiction regarding submetering so that shared service arrangements used by industrial and other customers are not drawn under Commission regulation when such supervision is not warranted.

{¶ 11} Regarding the *Shroyer Test* specifically, BOMA Cleveland, OAA, ICSC, NEP, and UMCA assert the Commission should not abandon this long-established precedent that was established by the Commission and affirmed by the Supreme Court of Ohio. They argue the Commission should apply the *Shroyer Test* and find that landlords, condominium associations, and submetering companies are not public utilities. BOMA Cleveland argues there is no regulatory purpose to treat commercial landlords as public utilities, as it would insert the Commission into the business of regulating landlord-tenant relationships, a role better left to the courts through the application of general civil laws. *Brooks*, Case No. 94-1987-EL-CSS, Entry (Mar. 16, 1995) at 6. According to BOMA Cleveland, OAA, ICSC, NEP and UMCA there is no need to

depart from the Commission's longstanding policy not to regulate commercial landlords by application of the *Shroyer Test.* NEP similarly argues that under the *Shroyer Test* condominium associations and similarly situated entities are not public utilities. Pursuant to R.C. 4905.04, the Commission only has the power and jurisdiction to regulate public utilities. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999), citing *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181 (1981); *Consumers' counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 152 (1981); *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302 (1980). Lastly, NEP argues that if the Commission were to assert jurisdiction over submetering in Ohio, the resulting expansion could lead to unintended consequences and would strain the Commission's limited time and resources.

{¶ 12} OCC and OPLC assert the Commission should apply the *Shroyer Test* and find that submetering entities are unlawfully operating as public utilities. Such a finding, they allege, would protect the public interest. Further, they suggest a few modifications to the *Shroyer Test* because any test regarding whether an entity is operating as a public utility must focus on "the character of the business in which [the entity] is engaged." *Indus. Gas. Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 21 N.E.2d 166 (1939). Therefore, no factor should be controlling when deciding whether an entity is a public utility; the case must be determined on its own facts and circumstances. OCC and OPLC argue the *Shroyer Test* is too narrowly drawn. Finally, they argue that without adequate protections in place, end-use consumers in submetering arrangements are susceptible to being gouged by entities that, from the end-use consumers' perspective, are no different than the legacy utilities that have operated for decades under Commission supervision. Similarly, Mark Whitt proposes the Commission adopt a modified version of the *Shroyer Test* that considers whether a respondent has assumed responsibility for providing utility service to consumers, applies the plain language of R.C. 4905.02, and considers service

responsibility. Mr. Whitt asserts that certain submetering companies are unlawfully operating as public utilities under the *Shroyer Test* as it currently stands.

{¶ 13} OPAE, AEP Ohio, FirstEnergy, and Duke assert the Commission should reconsider the *Shroyer Test* altogether and adopt a new test that would effectively eliminate submetering. They argue the *Shroyer Test* is not mandated by statute and the Commission can alter the test pursuant to its expert authority to implement R.C. 4905.02 and 4905.03. According to OPAE, AEP Ohio, Duke, and DP&L, the Supreme Court of Ohio in *Pledger* merely affirmed the Commission's use of the *Shroyer Test* as the Commission's means to implement the statute, and the Court deferred to the Commission's determination as "statutory interpretation by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Pledger*, 2006-Ohio-2989, ¶40. AEP Ohio and Duke propose a new test: "For purposes of determining whether an entity constitutes an 'electric light company,' a 'natural gas company,' or any other type of utility provider set forth in R.C. 4905.03, any entity that charges end-use consumers for the utility service in question satisfies the statutory definition."

{¶ 14} DP&L asserts the Supreme Court of Ohio's affirmation of the *Shroyer Test* was substantially based upon the Court's doctrine of deference to the agency in interpreting its own jurisdiction. *Pledger v. PUC*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14. Therefore, DP&L avers the Commission could significantly modify or even rewrite the *Shroyer Test*, but such a change in long-standing precedent should not be undertaken lightly. However, DP&L asserts that rather than undertake a Commission review of the *Shroyer Test*, a less contentious approach would be for the Commission to seek legislation on submetering from the General Assembly.

{¶ 15} Thereafter, on September 13, 2016, the OPLC, OCC, and Mark Whitt filed a joint motion for public hearings in this matter. They argue that local hearings should be

scheduled for the public to participate in this process. However, on September 28, 2016, NEP filed a memorandum contra arguing that the issue in this case is purely legal, not factual, and thus public hearing to consider the public's view on submetering would not in any sense inform the Commission on the legal question of its statutory jurisdiction over submetering.

IV. CONCLUSION

{¶ 16} The Commission notes that pursuant to R.C. 4905.04, 4905.041, 4905.05, and 4905.06, we have the exclusive authority to regulate and supervise public utilities in the state of Ohio. To determine whether an entity is a public utility, the Commission has adopted the *Shroyer Test*. As noted above, the *Shroyer Test*, which was affirmed by the Supreme Court of Ohio in *Pledger*, asks (1) has the landlord manifested an intent to be a public utility by availing itself of special benefits available to public utilities, (2) is the utility service available to the general public rather than just to tenants, and (3) is the provision of utility service ancillary to the landlord's primary business? *In re Shroyer*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992); *Pledger v. PUC*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14. Regarding the *Shroyer Test*, the Commission finds that we will now apply the *Shroyer Test* not just to landlords, but also to condominium associations, submetering companies, and other similarly situated entities. Second, regarding the third prong of the *Shroyer Test*, the Commission proposes that, if a landlord or other entity resells or redistributes utility services and charges an end use customer a threshold percentage above the total bill charges for a similarly-situated customer served by the utility's tariffed rates, an electric utility's standard service offer, or a natural gas utility's standard choice offer, then it will create a rebuttable presumption that the provision of utility service is *not* ancillary to the landlord's or entity's primary business. The appropriate threshold percentage will be determined by the Commission in this proceeding. Third, the Commission clarifies that failure of any one of the three prongs of the *Shroyer Test* is sufficient to establish that a landlord or other

entity is unlawfully operating as a public utility, including failure to overcome the proposed rebuttable presumption under the third prong.

{¶ 17} With respect to the Commission's finding to apply the *Shroyer Test* to landlords, condominium associations, submetering companies, and other similarly-situated entities, the Commission has long applied the *Shroyer Test* to determine if a landlord is operating as a public utility. The Commission will extend the *Shroyer Test,* on a case-by-case basis to determine whether a landlord, condominium association, submetering company, or any other similarly-situated entity is operating as a public utility. The Supreme Court of Ohio has recognized that public utilities furnish an essential good or service to the general public which has a legal right to demand or receive this good or service, and public utilities conduct their operations in such a manner as to be a matter of public concern. *S. Ohio Power Co. v. Pub. Util. Comm.*, 110 Ohio St. 246, 143 N.E. 700; *A&B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 388, 596 N.E.2d 423 (1992). Accordingly, we will apply the *Shroyer Test* regardless of whether that entity considers itself a landlord, condominium association, submetering company, or some other type of business. If any entity resells or redistributes public utility service, the Commission will apply the *Shroyer Test* to that entity to determine if it is operating as a public utility, and then whether it is doing so unlawfully.

{¶ 18} Further, the Commission proposes that, under the third prong of the test, when determining whether the provision of utility service is ancillary to the landlord's or other entity's primary business, we will apply a rebuttable presumption that the provision of utility service is *not* ancillary to the landlord's or other entity's primary business if the landlord or other entity charges the end use customer a certain percentage, to be determined by the Commission, above the total bill charges for a similarly-situated customer served by the utility's tariff rates, an electric utility's standard service offer, or a natural gas utility's standard choice offer. The landlord or other entity would then be

provided an opportunity to overcome this rebuttable presumption by presenting evidence that the provision of utility service is, in fact, ancillary to the landlord's or other entity's primary business. For example, the landlord or other entity could present evidence demonstrating that, irrespective of an individual customer's bills, the landlord or other entity provides utility service, in the aggregate, at cost.

{¶ 19} The Commission notes that, previously, we rejected consideration of the reasonableness of the charges for the resale or redistribution of utility service from consideration as a fourth prong of the *Shroyer Test*. *Shroyer* at 4, *8. However, it appears from this investigation that circumstances have significantly changed since our holding in *Shroyer* in 1992. Our creation of the rebuttable presumption in this case is based upon the comments we received regarding the unreasonably high rates and charges on the resale or redistribution of utility service to submetered customers. OCC and OPLC assert that the Commission should exercise the full extent of its statutory authority to safeguard the interests of customers who, because of submetering arrangements, are subject to paying higher prices for utility services. We agree and propose to apply the third prong of the *Shroyer Test* to determine if submetered customers are being charged unreasonably high rates or charges by an entity that is operating as a public utility. The Supreme Court of Ohio has recognized that "public utilities conduct their operations in such a manner as to be a matter of public concern." *S. Ohio Power Co. v. Pub. Util. Comm.*, 110 Ohio St. 246, 143 N.E. 700; *A&B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 388, 596 N.E.2d 423 (1992). Accordingly, when landlords or other entities charge unreasonably high rates or charges for the resale or redistribution of utility service, it becomes a matter of public concern and the Commission will exercise its authority to protect the public interest.

{¶ 20} Further, the Commission clarifies 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. If we find that a landlord or other entity is manifesting an intent to be a public utility, then we will recognize it as a public utility subject to the Commission's exclusive jurisdiction to regulate public utilities, and determine if it is operating unlawfully in violation of R.C. 4933.82. Similarly, if the service is available to the general public, rather than just to tenants, condominium owners, or other similarly-situated customers, then we will recognize the landlord or other entity as a public utility. Finally, if the resale or redistribution of public utility service is the landlord's or other entity's primary business, then we will recognize the landlord or other entity as a public utility, subject to the Commission's exclusive jurisdiction to regulate public utilities and the certified territory provisions of R.C. 4933.83.

{¶ 21} In *Shroyer,* when the Commission affirmed the right of apartment complexes, shopping centers, office buildings, recreational vehicle parks, campgrounds, and the like to redistribute utility services, the Commission provided that "[t]his is not to say that the Commission cannot set reasonable terms and conditions on jurisdictional utilities providing master meter service so as to ensure that users of that service (e.g., landlords) are providing it to the ultimate end user in a manner which is safe and consistent with the public interest. The Commission has expressed just such authority in setting terms and conditions on the resale of service to ensure that service is provided to the end user in a manner consistent with the public interest." *In re Shroyer,* Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) at 4, *9. The Commission has long recognized and maintained its authority to set terms and conditions on the resale of utility service to ensure the service is provided in a manner consistent with the public interest.

{¶ 22} Accordingly, the Commission requests comments and reply comments from interested stakeholders regarding the reasonable threshold percentage to establish the rebuttable presumption for which the provision of utility service is *not* ancillary to the

landlord's or other entity's primary business. Interested stakeholders are directed to file comments by January 13, 2017, and reply comments by February 3, 2017. Once comments and reply comments are filed, the Commission expects to act expeditiously in this matter.

V. ORDER

{¶ 23} It is, therefore,

{¶ 24} ORDERED, That interested persons may file comments by January 13, 2017, and reply comments by February 3, 2017. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

BAM/sc

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DEC 07 2016

Barcy F. McNeal

Barcy F. McNeal
Secretary

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

DISSENTING OPINION OF COMMISSIONER LYNN SLABY

I respectfully dissent. While initially I concurred in this case, I now must change my position to a dissent. The Public Utilities Commission, being a creature of statute, can only act on the authority given to us by the state legislature. The legislature has set out and defined what is and is not a public utility. At this time the Ohio Revised Code does not address the redistribution of electric, gas and water services beyond the master meter. I am convinced that this issue is a legislative matter and the legislature has the sole responsibility to set out who has the authority to police submetering companies.

Lynn Slaby, Commissioner

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Barcy F. McNeal

Barcy F. McNeal
Secretary