

In the Matter of the Commission's)
Investigation of Submetering in the State) Case No. 15-1594-AU-COI
of Ohio)

C0100331:1

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**ON BEHALF OF OHIO MANUFACTURERS'
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Pursuant to R.C. 4903.10 and Rule 4901-1-35 of the Ohio Administrative Code (“OAC”), Industrial Energy Users-Ohio (“IEU-Ohio”), Ohio Hospital Association (“OHA”), and Ohio Manufacturers’ Association (“OMA”)¹ seek rehearing of the Finding and Order (“Finding and Order”) issued by the Public Utilities Commission of Ohio (“Commission”) on December 7, 2016 for the following reasons:

Assignment of Error 3: The Finding and Order is unlawful and unreasonable because the Commission has engaged in rulemaking without complying with the requirements of R.C. 111.15.

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As further discussed in the attached Memorandum in Support, IEU-Ohio, OHA, and OMA request that the Commission grant rehearing and modify the Finding and Order to comply with Ohio law.

Respectfully submitted,

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**ON BEHALF OF OHIO MANUFACTURERS'
ASSOCIATION ENERGY GROUP**

**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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this investigation, the Commission is addressing a significant public interest question regarding its ability to regulate submetering. As the Office of the Ohio Consumers' Counsel has repeatedly demonstrated, residential customers served in facilities with submetering arrangements are often victims of pricing and service problems that are obviously unfair and unreasonable. To the extent that it is permitted under Ohio law to address the issues presented by submetering, the Commission should use that authority. At the same time, however, the Commission must address these problems in ways that do not create collateral problems for those arrangements for redistribution of utility services in the nonresidential sector that do not require and are not subject to Commission supervision. The Finding and Order in this case failed to meet that commonly understood goal. As a result, IEU-Ohio, OHA, and OMA are seeking rehearing to urge the Commission to tailor its response based on the tools it already has.

II. BACKGROUND

In *In re the Matter of the Complaints of Inscho v. Shroyer's Mobile Homes*, Case Nos. 90-182-WS-CSS, *et al.*, (Feb. 27, 1992) (“*Shroyer*” or “*Shroyer Test*” as the context requires), the Commission established a test (that the Supreme Court of Ohio (“Court”) affirmed in *Pledger v. Pub. Util. Comm’n of Ohio*, 109 Ohio St.3d 463 (2006) (“*Pledger*”)) to determine if a landlord providing certain services to a tenant falls within the definition of a public utility subject to the Commission’s regulation and supervision. Under the test, the Commission considers three questions:

1. Does the landlord avail itself of the special benefits available to public utilities (e.g. - public franchise, public right of way, or the right of eminent domain in the construction or operation of its service)?
2. Does the landlord only provide the utility service to its tenants rather than the general public?
3. Is the provision of the utility service clearly ancillary to the landlord’s primary business?

Shroyer, Opinion and Order at 4 (Feb. 27, 1992). See, also, *Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987, Entry at ¶¶ 9-12 (Mar. 16, 1995) (“*Brooks*”).

The Commission reviewed the application of the *Shroyer Test* in this proceeding in response to a complaint filed by a condominium owner that alleged that he was being charged unlawful rates for utility services. Entry (Dec. 16, 2015). In the Entry initiating the investigation, the Commission requested comments regarding whether it should continue to apply the *Shroyer Test* and whether the test could be applied to condominiums. *Id.*, ¶ 3. Interested persons filed Comments and Reply Comments on January 21, 2016 and February 5, 2016, respectively.

The Commission issued a Finding and Order on December 7, 2016. In the Finding and Order, the Commission stated that it would continue to apply the *Shroyer Test*, but

would extend its application to condominium associations, submetering companies, and other similarly situated entities on a case by case basis. Finding and Order at ¶¶ 16-17. Additionally, the Commission stated that, if a landlord or other entity resells or redistributes utility services and charges the end user a threshold percentage 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 company's standard choice offer, then the high bill charges will create a rebuttable presumption that the provision of service is not ancillary to the landlord or other entity's business. *Id.*, ¶ 18 ("Relative Price Test"). The Commission requested additional comments to address the "reasonable threshold percentage to establish a rebuttable presumption for which the provision of utility service is not ancillary to the landlord's or other entity's primary business." *Id.*, ¶ 22. Finally, the Commission stated that "failure of only one of the three prongs of the *Shroyer Test* is sufficient to demonstrate that an entity is unlawfully operating as a public utility." *Id.*, ¶ 20.

Because the Commission's changes to the application of the *Shroyer Test* are both unlawful and unreasonable, the Commission should grant rehearing. On rehearing, the Commission should reverse its determination that an entity is a public utility if it violates any of the *Shroyer* prongs and its attempt to define when the provision of utility service is not ancillary by reference to an arbitrarily based "threshold percentage."

III. ARGUMENT

- A. Assignment of Error I: The Finding and Order is unlawful and unreasonable because the Commission's finding that it can lawfully determine that an entity is operating as a public utility if the Commission finds that the entity fails one of the prongs of the *Shroyer Test* violates statutory requirements and established precedent that a finding that an entity is a public utility is a mixed question of law and fact**

The Commission is a creature of statute; it has only that jurisdiction and authority as provided by the General Assembly. *Columbus S. Power Co. v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.3d 535, 537 (1993). Ohio law limits the Commission's jurisdiction to "public utilities" as that term is defined in Title 49 of the Ohio Revised Code. See R.C. 4905.02 and 4905.03.

Under R.C. 4905.02, "every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in Section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit," is a public utility. R.C. 4905.03 provides the functional or operating characteristics for various types of public utilities such as a water-works company, sewage disposal company, or an electric light company.² The functional definitions also specify that public

² R.C. 4905.03 provides:

As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

...

(C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

...

(G) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

...

(M) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

utility status is confined to persons engaged in the business of performing the function with regard to consumers in Ohio. *In the Matter of the Application of The Procter & Gamble Company for Relief From Compliance With the Obligations Imposed by Title 49 of the Ohio Revised Code*, Case No. 03-725-HC-ARJ, Entry at 2 (Apr. 10, 2003).

Statutory exceptions also may prevent the Commission from exercising regulatory authority over the provision of services. For example, the Commission lacks jurisdiction over cooperative and municipal electric light companies. R.C. 4905.02(A). Also, R.C. 4905.03(E) provides, “The commission, upon application made to it, may relieve any producer or gatherer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as the producer or gatherer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as the producer or gatherer does not engage in the distribution of natural gas to consumers.” See, e.g., *In the Matter of the Application of American Landfill Gas Company for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Ohio Revised Code*, Case No. 97-194-GA-ARJ, Entry at 2 (Apr. 17, 1997). Under a statutory exception, the Commission also concluded that a non-profit cooperative arrangement for the joint operation of a sewage treatment facility by industrial customers was not subject to the Commission’s regulatory jurisdiction. *In the Matter of the Application of Hissong-Kenworth, Inc. Requesting a Declaration Regarding its Public Utility Status*, Case No. 84-565-ST-ARJ, Entry at 1 (May 22, 1984).

“The statutory definitions, however, are not self-applying.” *Pledger*, 109 Ohio St.3d at 465. Prior to the adoption of the *Shroyer Test*, the Commission determined whether an entity was a public utility within the meaning of R.C. 4905.02 and 4905.03 upon a review of “all facts and circumstances presented.” *In the Matter of the Complaint of Ken Meek, Complainant, v. Gem Boat Service, Inc., Gem Beach Marina, Inc., and Paul Grummel, Respondents*, 1987 Ohio PUC LEXIS 1335 at *19 (Mar. 3, 1987) (“*Gem Beach*”). In *Shroyer*, the Commission adopted a three-part test³ (that the Court has affirmed in *Pledger*) to determine if a landlord providing certain services to a tenant falls within the definition of a public utility subject to the Commission’s regulation and supervision. *Shroyer*, Opinion and Order at 4 (Feb. 27, 1992).

The Commission has extended the *Shroyer* test to commercial tenancies in *Brooks*. In that case, commercial tenants of a mall sued the landlords, stating that the landlords were violating a resale restriction in the Toledo Edison tariffs and that the landlords were operating illegally as public utilities. The tenants also alleged that the landlords were operating as agents of Toledo Edison. *Brooks*, Entry at ¶ 2 (Mar. 16, 1995). Applying *Shroyer*, the Commission dismissed the complaint against the landlords. The Commission found that the *Shroyer Test* provides adequate criteria for distinguishing entities which operate as *de facto* public utilities. *Id.*, Entry at ¶ 10. The Commission also dismissed the claim that the landlords may be acting as agents of Toledo Edison; even if the landlords were agents of Toledo Edison, the “assumed agency relationship does not

³ The test proposed by the Staff contained a fourth element addressing the reasonableness of the landlord’s charges. The Commission refused to adopt the fourth prong in *Shroyer*. *Shroyer*, Opinion and Order at 4.

transform [the landlord] into a public utility subject to [the Commission's] jurisdiction." *Id.* at ¶ 11.

The commercial tenants also sued Toledo Edison because Toledo Edison failed to enforce its tariff that contained a restriction on resale of electric service. In a separate decision, the Commission dismissed the complaint against Toledo Edison, holding that the utility company had no valid right or interest in restricting redistribution and resale by a landlord if the landlord was not acting as a public utility and the landlord owned the property on which the redistribution took place. *Brooks*, Entry at 13-17 (May 8, 1996).⁴

The enactment of Amended Substitute Senate Bill 3 ("SB3") did not alter the Commission's determinations regarding the nature and scope of functional activities that give rise to public utility status. Following its decision in *Brooks*, the Commission stated, "[N]othing in SB3 ... requires or warrants the Commission to change its position that such landlords are not electric light companies." *In the Matter of the Application of First-Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, PUCO Case Nos. 99-1212-EL-ETP, *et al.*, Entry at 3 (January 18, 2001) ("*FirstEnergy*").⁵ Additionally, the Commission concluded that a landlord was not an "aggregator" because that designation was inconsistent with

⁴ Subsequently, the General Assembly enacted R.C. 4928.40(D). That division provides: "Beginning on the starting date of competitive retail electric service, no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service."

⁵ See, also, *Orwell Natural Gas Co. v. Fredon Corp.*, 2015-Ohio-1212 ¶¶ 60-72 (11th Dist. Ct. App. Mar. 11, 2015) (deed restriction limiting right to procure natural gas violates public policy).

prior holdings and would lead to unnecessary regulation and possibly costly reconfiguration of electric facilities. *Id.*⁶

The Commission's decisions prior to *Shroyer* and the later adoption of the three-prong test in landlord-tenant cases follow from the Court's admonition that the determination whether a person is a "public utility" is a mixed question of law and fact. *A & B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64 Ohio St.3d 385, 387 (1992). In the determination whether an entity is acting as a public utility, the Court stated, "The main and frequently most important attribute of a public utility is a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service." *Id.* See, also, *Southern Ohio Power Co. v. Public Util. Comm. of Ohio*, 110 Ohio St. 246, 252 (1924). This factor requires that the business, in order to qualify as a public utility, must "provide its good or service to the public indiscriminately and reasonably." *A & B Refuse Disposers, Inc.*, 64 Ohio St.3d at 387. "The second characteristic of a public utility most often addressed by courts is whether the entity, public or private, conducts its operations in such a manner as to be a matter of public concern." *Id.* at 388. The Court, however, noted that no one factor is controlling and several factors must be weighed to determine whether the company's business is conducted in such a manner as to become a matter of public concern. *Id.*

As this case law demonstrates, the Court and the Commission have long recognized that factual differences matter. Simply labelling something as a "utility service" is not sufficient to support a determination that a particular arrangement should

⁶ Under R.C. 4928.08, the Commission has the authority to regulate the providers of competitive electric services. This authority may extend to the resale of electric services by submetering companies.

be subject to and receive the benefits of public utility status.⁷ Nor is any one attribute controlling in a determination whether an entity is a public utility.

Likewise, these differences are important to business operations. Not all arrangements that allow an ultimate consumer of electricity, natural gas, water, or wastewater treatment services to obtain such service from or through another consumer or separate entity have a purpose, nature, or scope that is sufficient to cause the arrangement to fall within the common law or statutory definition of a “public utility.” It is often the case in Ohio that multiple non-residential consumers are located on property, such as a campus, which includes facilities, plant, and equipment that allow each consumer to receive electricity, natural gas, water or wastewater treatment services through a “master-meter,” or jointly or individually owned facilities, plant, or equipment. These arrangements arise voluntarily and have become more common over time because corporations have spun off or separated individual business units that may have separate corporate identities even if commonly owned. Typically, these arrangements are ancillary to and not the primary purpose of the relationship between the individual non-residential consumers. Under well-understood Ohio statutes and judicial and administrative orders, these arrangements are not and should not be subject to the Commission’s regulatory supervision.

Following the Commission’s Finding and Order in this investigation, however, business arrangements that have not been subject to Commission jurisdiction are in

⁷ See, also, *In the Matter of the Commission Investigation into the Resale and Sharing of Local Exchange Telephone Service*, Case No. 85-1199-TP-COI, 1986 Ohio PUC LEXIS 39 at *12 (Aug. 19, 1986) (shared tenant services where a third-party provides telecommunications services to the occupants of multi-tenant buildings, complexes, or developed properties through a private branch exchange are not subject to Commission regulation) and R.C. 4905.90(K) (operator of a master-metered natural gas system is not a public utility or a natural gas company for purposes of R.C. 4905.90 to 4905.96).

jeopardy of being swept under the Commission's supervision. In particular, the Commission's change to the *Shroyer Test* that would base a finding that an entity is a public utility based on a finding that it failed any prong will lead to unlawful and unreasonable determinations that entities are operating as public utilities. For example, an entity may offer to provide water service to others on a campus to amortize the cost of extending lines. If the Commission concluded that the provision of that service is to the general public, the entity may be subject to Commission regulation as a public utility although the entity has not availed itself of the special benefits available to public utilities and the service is ancillary to its business. This result simply makes no sense and would not be a lawful extension of Commission regulation.

The potential for misapplication of the Relative Price Test to conclude that an entity is a public utility is another example of the error inherent in the Commission's revision of the *Shroyer Test*. If an entity prices its service at an amount above an alternative available from the utility, the Commission will presume that the entity's provision of utility service is not ancillary and then could conclude that the entity is a public utility on the basis that it "failed" one of the three prongs of the *Shroyer Test*. Thus, an entity's demonstration that it is not claiming the rights of a utility to take property or offering a service to the public will not be relevant. The price of the service becomes a substitute for a determination whether the entity is engaged in the business of a public utility.

This new approach to defining what is a public utility by reference to only one of the *Shroyer* prongs is likely to cast a wide net that collects questionable operations that result in price gouging of residential customers, but also catches other non-residential arrangements for which no Commission intervention has ever been recognized or

warranted because they are voluntary arrangements between sophisticated parties. When the Commission adopted the *Shroyer Test*, it was well aware that too large a net was inconsistent with its statutory authority or its resources. *Shroyer*, at 4. In recognition of both its legal duties to protect the public interest and to regulate responsibly, the Commission adopted the *Shroyer Test*'s three separate prongs based on long experience, an understanding of the common law and statutory principles defining a public utility status, and common sense. The move to a new test that elevates any one prong to a determination that an entity is a public utility so that price gouging is addressed is neither warranted by Ohio law nor reasonable.

B. Assignment of Error 2: The Finding and Order is unlawful and unreasonable because the Commission's creation of a rebuttable presumption that an entity is a public utility based on a "Relative Price Test" is not based on a rational nexus between the proven facts and the presumed facts

In the Finding and Order, the Commission modified the third prong of the *Shroyer Test* to include a Relative Price Test. Under this new "Test," the Commission stated a rule of evidence that the provision of a utility service is presumed to be not ancillary to the landlord's or other entity's primary business if the landlord or other entity charges the end user a certain to-be-determined percentage 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 company's standard choice offer. Finding and Order at ¶ 18. The landlord or other entity then would have to present evidence to demonstrate that its provision of service was ancillary to its business. *Id.* The Commission introduced the Relative Price Test because of complaints that submetering companies are price-gouging residential customers. *Id.*, ¶ 19. Because there is no rational nexus between the relative

price of services and a determination that the provision of service is ancillary to the entity's business, the Finding and Order is unreasonable and unconstitutional.

As Professor Weinstein explains in his treatise on evidence, “[t]o be constitutional, a civil presumption requires ‘some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.’” Weinstein’s Federal Evidence § 301.03, citing *Mobile, Jackson and Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43-44 (1910). The rational nexus requirement applies to the presumptions relied upon by administrative agencies. *United Scenic Artists, Local 829 v. NLRB*, 726 F.2d 1027, 1034 (D.C. Cir. 1985). “Where such a nexus is lacking, the presumption is invalid.” *Id.*, citing *United States Department of Agriculture v. Murry*, 413 U.S. 508, 37 L. Ed. 2d 767, 93 S. Ct. 2832 (1973); *Vlandis v. Kline*, 412 U.S. 441, 37 L. Ed. 2d 63, 93 S. Ct. 2230 (1973); *Holland Livestock Ranch v. United States*, 543 F. Supp. 158 (D. Nev. 1982), *aff’d*, 714 F.2d 90 (9th Cir. 1983); *United States v. Murff*, 265 F.2d 504, 506 (2d Cir. 1959); *Owens v. Roberts*, 377 F. Supp. 45, 54-55 (M.D. Fla. 1974).

Under Ohio law, a public utility is defined by the functions it performs. R.C. 4905.03 defines electric light companies, natural gas companies, and water-works companies as companies that supply electric services to consumers, supply natural gas for lighting, power, or heating, and supply water through pipes to consumers, respectively. The *Shroyer Test* then addresses whether an entity is conducting this business in a manner that comes within the scope of that definition by looking at whether the entity is availing itself of the benefits available to a public utility, making the service available to the general public, and providing that service as its primary, rather than ancillary, business.

The functional definition of what constitutes a public utility is a separate determination from the determination whether a public utility is pricing utility services at an excessive price. The first issue is whether the entity is performing functions defined by Ohio law as constituting the provision of utility service. If the entity is found to be a public utility because it provides services that are subject to the Commission's jurisdiction, then the Commission must determine if the entity is providing a service that is price regulated or that is subject to market-based pricing. See, e.g., R.C. 4928.05(A) (Commission regulation to apply price regulation to electric companies is limited). Only if the service is provided by a public utility and is subject to price regulation may the Commission then apply the statutory requirements for price regulation to determine if the prices being charged are not lawful and reasonable. R.C. 4905.26. As the Commission determined in *Shroyer*, "[t]he reasonableness of a separate charge for water service is only meaningful if the Commission has first established that it has jurisdiction over the entity providing the service." *Shroyer*, at 4.

Further, the Commission fails to provide a reasoned explanation for expanding the definition of public utility to include the Relative Price Test. Although the Commission seeks to justify the creation of a rebuttable presumption on the basis of some alleged change in circumstances due to the comments the Commission received regarding unreasonably high rates and charges for resale or redistribution of services to sub-metered customers, Finding and Order at ¶ 19, the lack of connection that the Commission identified in *Shroyer* is not changed because customers are complaining legitimately about prices. In *Shroyer*, for example, the complainants raised a similar issue: the park owner had attached meters to the complainants' mobile homes and was

alleged to have improperly charged the complainants for water usage. *Shroyer*, at 2. Not surprisingly, complaints about excess pricing also are the norm in commercial lease cases addressed by the Commission. See, e.g., *In the Matter of the Complaint of Toledo Premium Yogurt, Inc., v. Toledo Edison Company, New Towne Mall Company, New Towne Developers, and M.S. Management Associates, Inc.*, 1992 Ohio PUC LEXIS 850 (Sept. 17, 1992), *appeal dismissed*, *Toledo Premium Yogurt, Inc. v. Pub. Utils. Comm'n of Ohio*, 66 Ohio St.3d 1465 (1993). Thus, nothing has changed since the Commission issued its decision in *Shroyer* to justify the Commission's current attempt to redefine whether the provision of a service is ancillary by applying the Relative Price Test.

In practice, moreover, the rule is unworkable for several reasons.

One obvious problem is the lack of comparability between a standard service offer and a shopped offer. The standard service offer is competitively bid with the layered prices blended over time with protocols to allocate the blended aggregate price to specific default rate schedules. It is more likely, however, that sub-metered customers will shop, and the shopped price obtained may be fixed for a term rather than variable as with the standard service offer. The shopped price also may reflect the specific load and usage characteristics, technology preferences (renewable for example), credit risk, allocation of price and volume risk and other variables unique to the sub-metered customers. Comparing the standard service offer to the shopped price is a comparison of apples to oranges; it provides no meaningful information.

A second problem is related to the randomness of a comparison. Standard service offers approved by the Commission have riders with their own reconciliation requirements for over and under collections. Thus, the application of a percentage difference creating

a rebuttable presumption that an entity is a public utility is subject to a standard service offer price that may change overnight.

Comparisons are also unwarranted when the provision of service to the sub-metered customer is bundled with other services such as water or natural gas service.

The Commission also failed to explain how the comparison is to be applied when the submetering arrangement is in a service area served by a municipal utility or a cooperative.

In a nutshell, the *Test* will cause the Commission to engage in a more complicated and less predictable process than what it currently performs under the case-by-case review.

To be constitutional, a rebuttable presumption must be based on a rational nexus between the facts proven and the facts to be presumed. Whether the Commission adopts .1%, 5%, or 100% as the threshold percentage, the percentage is not reasonably connected to the determination whether the service is ancillary or the broader question whether the entity functions as a public utility. Instead, the determination whether an entity's provision of a utility service is ancillary focuses on the entity's lines of business. Because the relative price of a service has no rational nexus to the conclusion that an entity is operating as a utility, the Commission's creation of the rebuttable presumption in this case is unlawful.

C. Assignment of Error 3: The Finding and Order is unlawful and unreasonable because the Commission has engaged in rulemaking without complying with the requirements of R.C. 111.15.

In this investigation, the Commission has adopted new rules of general and uniform application to entities that redistribute utility services. Although this investigation

has produced new rules, the Commission has not complied with the mandatory rulemaking process contained in R.C. 111.15. Accordingly, the new rules are unlawful.

In the Order, the Commission has adopted rules within the meaning of R.C. 111.15. As the Commission explains, the Commission will review entities engaged in the redistribution of utility services under a modified *Shroyer Test*. Under the new rules, failure on any *Shroyer* prong will lead to a determination that the entity is a public utility subject to the Commission's jurisdiction, and the Commission has created a rebuttable presumption or rule of evidence that distribution at a price above a to-be-determined threshold percentage will demonstrate that the service is not ancillary. Finding and Order at ¶¶ 16-22. Those "rules" affect proceedings that will come before the Commission in which an entity is alleged to be a public utility. The new requirements are a statement of the "agency position which has legal consequences." *Appalachian Power Co. v. U.S. Environmental Protection Agency*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). Thus, the Commission has issued administrative rules.

Because the Commission was engaged in a rulemaking, the Commission was required to comply with the requirements of R.C. 111.15. The procedure for adoption of a rule under that section requires that the rule be filed sixty-five days before its filing in final form with the Joint Committee on Agency Rule Review. R.C. 111.15(D). If the rule is filed under R.C. 111.15(D), it must also be filed with the Secretary of State and the Legislative Service Commission. R.C. 111.15(E). The rule is without effect until ten days after it is properly filed in final form with the Secretary of State, Legislative Service Commission, and Joint Committee on Agency Rule Review. R.C. 111.15(B). If the agency fails to comply with the requirements of R.C. 111.15, the rule is ineffective and

cannot be enforced. *State, ex rel. Board of Education, v. Holt*, 174 Ohio St. 55 (1962). See *Carroll v. Dept. of Administrative Services*, 10 Ohio App. 3d 108 (1983) (employee could not be compelled to comply with a rule promulgated beyond agency's authority).

The reason for requiring compliance with the rulemaking procedures of R.C. 111.15 is to assure openness and fairness. See *Appalachian Power Co. v. U.S. Environmental Protection Agency*, 208 F.3d at 1028. "Requiring [an agency] to undertake rulemaking procedures before applying the new standard ... ensures that all stakeholders ... have an opportunity to express their views on the wisdom of the proposal and to contest its legality if they so desire." *Fairfield County Bd. of Comm'rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶ 30.

The Commission has adopted rules without complying with the requirements of R.C. 111.15. In the Finding and Order, the Commission makes no allowance for compliance with filing requirements or submission to the proper agencies. Because it has failed to comply with the requirements of R.C. 111.15, the rules adopted by the Commission are without effect.

The Commission, moreover, cannot justify its action in this case as a standard application of the adjudication process. In the situations in which the Commission may adopt a "rule" by adjudication, "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery*, 318 U.S. 80, 95 (1943). As discussed above, the Commission has exceeded its authority in the manner it has redefined the test for determining whether an entity is a public utility. Thus, the use of an adjudicatory process to adopt the new standard cannot be upheld.

IV. CONCLUSION

Price-gouging is a real problem, but the solution offered by the Commission in this case is beyond its authority. Therefore, the Commission should grant rehearing and reverse the revisions to the *Shroyer Test* that would declare an entity to be a public utility if it “fails” any *Shroyer* prong and the rebuttable presumption that an entity is a public utility if it prices services at a to-be-determined amount in excess of a regulated price.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon persons that the Commission has identified.

/s/ Frank P. Darr

Frank P. Darr

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