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

COMMENTS ON THE RELATIVE PRICE TEST OF INDUSTRIAL ENERGY USERS-OHIO, OHIO HOSPITAL ASSOCIATION, AND OHIO MANUFACTURERS' ASSOCIATION

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ON BEHALF OF OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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I. INTRODUCTION

In *In re Inscho v. Shroyer's Mobile Homes*, Case Nos. 90-182-WS-CSS, *et al*., Opinion and Order (Feb. 27, 1992) ("*Shroyer*" or "*Shroyer Test*" as appropriate), the Public Utilities Commission of Ohio ("Commission") established a three prong test to determine if a landlord providing "utility" services such as water to a tenant falls within the definition of a public utility subject to the Commission's jurisdiction. The test poses 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 (Mar. 16, 1995) ("*Brooks*").

In response to a complaint filed by a condominium owner that an entity he alleged was engaged in the unlawful provision of utility services, *Whitt v. Nationwide Energy*

Partners, Case No. 15-697-EL-CSS, Complaint (Apr. 10, 2015), the Commission opened this investigation to address whether it would apply the *Shroyer Test* to condominium owners and other entities that redistribute utility services. Entry at 2-3 (Dec. 16, 2015). After the Commission received comments from interested parties, it issued a Finding and Order on December 7, 2016. In the Finding and Order, the Commission modified the third prong of the *Shroyer Test* to include a rebuttable presumption that the provision of a utility service is not ancillary to the landlord's or other entity's primary business if the landlord or other entity charges the end user a 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 ("Relative Price Test"). 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. The Commission then requested comments and reply comments on the threshold percentage it should adopt as a trigger to the application of the Relative Price Test. *Id*., ¶ 22.

The Commission's concern with price-gouging is understandable. The solution it has proposed, however, assumes that there is a basis for presuming that a company is a public utility if its pricing exceeds some yet-to-be-defined threshold. The determination of utility status based on the Relative Price Test, however, is not supported by the Commission's statutory authority, by the experience of this Commission, or by the precedent of the Supreme Court of Ohio ("Court"). Further, there is no logical or factual basis for finding that a person redistributing service at a price above a regulated price is

a public utility. As a result, the attempt to set an arbitrary rule that shifts the burden of of going forward with evidence will not provide this Commission or the parties a usable test for determining whether the service provided by an entity is ancillary.

A. The Commission should limit the application of the Relative Price Test to the provision of services to residential customers

In its order modifying the *Shroyer Test*, the Commission stated that it adopted the Relative Price Test due to comments it received regarding unreasonably high rates and charges on the resale or redistribution of utility service to residential customers. Finding and Order at ¶ 19. While this legitimate concern can and should be addressed within the Commission's existing authority, the nature of the problem identified by the Commission also recommends that the Commission apply the Relative Price Test to only the provision of residential services for several reasons.

Initially, nothing in the Commission's order or the comments that were filed in this proceeding provides a factual basis for extending the test to the provision of services to commercial and industrial customers.[1] As noted in the comments of IEU-Ohio, commercial and industrial customers have entered into shared service arrangements for years under the existing regulatory structure and have not resorted to Commission intervention. Initial Comments of Industrial Energy Users-Ohio at 8-9 (Jan. 21, 2016).

[1] Ohio Power Company and Duke Energy Ohio, Inc. offered some general comments about the benefits of regulation, but did not claim non-residential customers operating under shared service arrangements were adversely affected by those arrangement. Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. (Jan. 21, 2016). Ohio Power Company has broadened its claims regarding the application of regulation in a complaint case filed by the Office of the Ohio Consumers' Counsel, but the assertions it makes remain generalized. *Office of Ohio Consumers' Counsel v. Ohio Power Company*, Case No. 16-782-EL-CSS, Ohio Power Company's Motion for Tariff Amendment (Apr. 27, 2016). Ohio Power Company's motion has been opposed on multiple grounds because it is unlawful and unreasonable. *See, e.g., id*., Memorandum Opposing Ohio Power Company's Motion for Tariff Amendment by Industrial Energy Users-Ohio (May 10, 2016). The lack of complaints by non-residential customers is strong evidence that extension of the Relative Price Rule to non-residential shared service arrangements is not warranted even if the Test is lawful and reasonable.

Because sophisticated customers can address their needs and assess the relative costs of shared service arrangements, these arrangements do not pose the kinds of problems the Commission seeks to address in this proceeding.

Additionally, the complexity of commercial and industrial shared services arrangements defies proper application of the Relative Price Test. These complex agreements often provide for several services, which make the comparability of utility rates to the contract rates meaningless.

Finally, the application of a Relative Price Test will inject unnecessary uncertainty into non-residential shared services arrangements. *Id*.

B. The determination whether an entity is a public utility based on the Relative Price Test is not supported by statute or Commission experience

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:

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).[3]

The only instance in which pricing tangentially is raised in the statutory definitions of a public utility arises in an exemption for non-profit cooperatives that provide utility services. *See, e.g., 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). Even under this statutory exemption, it is not relative price that establishes the exemption; rather the Commission does not have jurisdiction over the

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> 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.

[3] 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. On the other hand, 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).

entity because it is a non-profit organization. The organization's prices could be higher relative to a regulated utility's prices, but the Commission would not secure jurisdiction because of that price difference.

"The statutory definitions, however, are not self-applying." *Pledger v. Pub. Util. Comm'n of Ohio*, 109 Ohio St.3d 463, 465 (2006) ("*Pledger*"). For example, the Commission applies the *Shroyer* three-part test (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). *See, also, Brooks,* Entry (Mar. 16, 1995).

In *Shroyer*, the Commission addressed whether a price test should inform its decision whether an entity was a public utility subject to its jurisdiction because Commission Staff ("Staff") advanced a fourth prong to the test that asked that the Commission consider whether the entity separately charged for services or, if it separately charged, whether the charge was reasonable. *Shroyer*, Brief of Staff of the Public Utilities Commission of Ohio at 3 (Nov. 6, 1990). The Commission refused to include the fourth prong because "[t]he Commission [did] not believe that the fourth part of Staff's test is meaningful in determining our jurisdiction. *The 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*, Opinion and Order at 4 (emphasis added).

Apart from the fact that the Commission considered and rejected a price test in *Shroyer*, a price test is also inconsistent with the Commission's case-by-case determination of utility status. Whether an entity is a public utility within the meaning of

R.C. 4905.02 and 4905.03 is based on a review of "all the 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*"). The Commission's three-part test in landlord-tenant cases similarly follows 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).

The Commission's introduction of the Relative Price Test is not consistent with either the statutory definitions of entities that are subject to the Commission's jurisdiction as public utilities or the case law applying those statutes. The Commission's attempt through comments to establish a threshold percentage to be used in the Relative Price Test, thus, does not have a sound legal basis.

C. Because there is no rational nexus between the price of services and a determination that the provision of service is ancillary to the entity's business, adoption of an arbitrary price test is unlawful and unreasonable

In this stage of the investigation, the Commission seeks to establish a threshold percentage for the Relative Price Test as a trigger to a rebuttable presumption that an entity that prices its services "too high" is a public utility. Finding and Order at ¶18. The relative price of a service, however, has no rational nexus to the determination whether an entity is a public utility. Applying this threshold percentage, regardless of level, would be 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 F2d 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.

There is no logical nexus between the price an entity sells a service and the conclusion that the entity is a public utility. 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.

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 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. Pricing issues were presented, but the Commission refused to adopt a test for determining whether an entity was a public utility on the basis of what it charged. *Id*. at 4. Not much has changed in that regard since the Commission decided *Shroyer*. Not surprisingly, complaints about excess pricing are the norm even in the few 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). The fact that customers have complained about pricing thus provides no reasoned basis for adopting a new but faulty standard.

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 (the purchase of power from renewable resources, 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 existing case-by-case review.

To be constitutional, a rebuttable presumption must be based on a rational nexus between the facts proven and the fact to be presumed. The relative price of service has no rational nexus to the conclusion that an entity is operating as a utility. Accordingly, the

Commission's attempt to establish a threshold percentage should not advance. Rather, as argued elsewhere, the Commission should continue to decide cases based on all the facts and circumstances without reference to service pricing.

D. There is no reasoned basis to establish a percentage threshold

As discussed above, the question presented for comments by the Commission misses the mark: the Commission must first determine if an entity is functionally operating as a public utility. If the entity is a public utility subject to Commission regulation, 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. 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.

II. CONCLUSION

The request for comments on the threshold percentage is proceeding from a mistaken premise. The premise is that the relative price of a service in some way answers the question whether the provision of the service is ancillary to the main business of the entity. Price, however, is not a legitimate basis for asserting jurisdiction, as the Commission understood until the Finding and Order in this case. Rather than corrupt a workable test for assessing whether an entity is a public utility with a price test, the

Commission should address whether an entity's provision of utility service is ancillary by reference to the factors it has historically used.

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. Service by email has been made to the persons listed below on January 13, 2017.

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Summary: Comments on the Relative Price Test of Industrial Energy Users-Ohio, Ohio Hospital Association, and Ohio Manufacturers' Association electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio