

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

Robert A. Brundrett (0086538)
Ohio Manufacturers' Association
33 N. High St., 6th Floor
Columbus, OH 43215
Telephone: (614) 224-5111
Fax: (614) 469-4653
rbrundrett@ohiomfg.com

JANUARY 17, 2017

**ON BEHALF OF OHIO MANUFACTURERS'
ASSOCIATION**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE COMMISSION SHOULD REJECT THE EDUS' REQUEST TO REVISE THE "RELATIVE PRICE TEST"	2
III. THE COMMISSION SHOULD REJECT THE RECOMMENDATIONS THAT THE COMMISSION SHOULD MAKE SUMMARY FINDINGS CONCERNING THE STATUS OF CERTAIN PARTIES OR ACTIVITIES	5
IV. THE COMMISSION SHOULD REJECT OCC'S CLAIM THAT THE COMMISSION MISPLACED THE BURDEN OF PROOF ON THE CONSUMERS TO RAISE THE ISSUE OF AN ENTITY'S STATUS AS A PUBLIC UTILITY	7
V. OCC'S RECOMMENDATION THAT THE COMMISSION IMPOSE ON OHIO'S DISTRIBUTION UTILITIES A DUTY TO ADOPT TARIFFS TO RESTRICT RESALE OF UTILITY SERVICES MUST CONFORM TO R.C. 4928.40(D) AND STATE POLICY	7
VI. OCC'S RECOMMENDATION THAT THE COMMISSION IMPOSE CONSUMER PROTECTIONS ON A FINDING THAT AN ENTITY FAILED THE RELATIVE PRICE TEST IS UNLAWFUL AND UNREASONABLE	8
VII. THE COMMISSION SHOULD LIMIT THE SCOPE OF THE PROCEEDING TO THE PROVISION OF SUBMETERING TO RESIDENTIAL CUSTOMERS	9
VIII. CONCLUSION.....	10

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM OF INDUSTRIAL ENERGY USERS-OHIO, OHIO HOSPITAL
ASSOCIATION, AND OHIO MANUFACTURERS' ASSOCIATION OPPOSING
APPLICATIONS FOR REHEARING**

I. INTRODUCTION

To the extent that it is permitted under Ohio law to address the issues presented by submetering, the Public Utilities Commission of Ohio ("Commission") should use that authority. In at least two respects, however, the Commission has overstepped its authority in this proceeding by modifying the *Shroyer Test*¹ so that a determination that an entity that fails any prong of the *Test* will be deemed a public utility subject to the Commission's jurisdiction and the introduction of a new test whether the redistribution of a service is ancillary based on its price relative to that of an incumbent utility ("Relative Price Test"). Finding and Order at ¶¶ 18 & 20 (Dec. 7, 2016); Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio, Ohio Hospital Association, and Ohio Manufacturers' Association (Jan. 6, 2017) ("IEU-Ohio/OHA/OMA Application for Rehearing"). The Office of the Ohio Consumers' Counsel ("OCC") with the Ohio Poverty

¹ *In re the Matter of the Complaints of 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 the context suggests).

Law Center and several Ohio electric distribution utilities (EDUs), however, have sought in applications for rehearing to further expand the Commission's regulation of submetering in ways that exceed the Commission's authority. Application for Rehearing by the Office of the Ohio Consumers' Counsel and the Ohio Poverty Law Center (Jan. 6, 2017) ("OCC Application for Rehearing"); Joint Application for Rehearing of Ohio Power Company; Duke Energy Ohio, Inc.; and Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (Jan. 6, 2017) ("EDU Application for Rehearing"). On the other hand, Nationwide Energy Partners seeks to unlawfully constrain the Commission's authority. Application for Rehearing of Nationwide Energy Partners, LLC (Jan. 6, 2017) ("NEP Application for Rehearing"). The Commission should reject the assignments of error in support of these positions for the reasons discussed below.²

II. THE COMMISSION SHOULD REJECT THE EDUS' REQUEST TO REVISE THE "RELATIVE PRICE TEST"

In the Finding and Order, 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 ("SSO"), or a natural gas company's standard choice offer, then the bill charges will create a rebuttable presumption that the provision of service is not ancillary to the landlord or other entity's business. Finding and Order at ¶ 18 ("Relative Price Test").

² This memorandum opposing rehearing addresses a subset of the assignments of error in the applications for rehearing filed on January 6, 2017 in this matter. Failure to address a particular assignment of error should not be viewed as agreement or disagreement with that assignment of error.

In their application for rehearing, the EDUs propose that the Relative Price Test be modified to impose a rebuttable presumption if a landlord or other entity charges a price above what the landlord or other entity pays for the utility service it is redistributing to an end user. EDU Application for Rehearing at 2. To justify their proposed modification of the Relative Price Test, the EDUs urge that the Commission determine that an entity is “engaged in the business of” providing a utility service if it marks up the price of the service such that the service is a “profit center” for the entity providing the service. *Id.* at 9-10. The EDUs also attempt to justify their modification on the claim that their price test more accurately reflects the product customers are receiving. Working from the premise that customers receiving a service subject to regulation pay a reasonable and fair price, they argue that it would be “profoundly unfair” for submetering customers to pay an electric utility’s standard service offer price because the product they are receiving is “vastly inferior” to what the EDUs’ customers receive. EDU Application for Rehearing at 11.

The EDUs’ proposed change to the Relative Price Test does not correct the underlying problems of the Test and, like the Test itself, should be rejected.

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 determination whether an entity is a public utility is separate from the determination whether a public utility is pricing utility services at an excessive price. IEU-Ohio/OHA/OMA Application for Rehearing at 13-17.

Changing the Relative Price Test as proposed by the EDUs does not address the Test's basic flaw. Whether the Commission reviews the difference against what the entity is charged for a redistributed service or what the entity bills the end user, the difference does not rationally support a finding that the entity is a public utility. The price of the service, as the Commission has long held, is not reviewed until the Commission first determines that the entity is performing the functions of a utility under circumstances that demonstrate that utility regulation is in the public interest. *Shroyer*, at 4.

The EDUs' modification of the Relative Price Test also does not address the unworkability of a price test. IEU-Ohio/OHA/OMA Application for Rehearing at 16-17. Measuring a markup assumes that the Commission will have access to billing and customer usage information. As commercial building owners explained, the level of detailed load information simply may not exist or be too expensive to secure. Joint Application for Rehearing of the Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio at 9 (Jan. 6, 2017) ("BOMA"). Furthermore, securing and reviewing the information needed to apply the Relative Price Test will place the Commission in the intrusive position of regulating the relationships between an entity and end users that the Commission chose to avoid over twenty years ago because neither Ohio law nor sound regulatory policy and practice supported the intrusion. *Shroyer*, at 5.

The facts in *Shroyer* provide an additional demonstration of the inappropriateness of using a price to determine utility status. In *Shroyer*, the landlord secured water service from the adjacent municipal utility at a commercial rate and resold it at the municipal utility's residential rate. If the customers served by the landlord had been charged the

applicable utility rate, they would have paid an even higher charge because the trailer park was outside the municipal limits and the municipal utility charged non-residents a higher rate. *Shroyer*, at 2. Under the EDUs' proposed modification, the landlord would have failed the Relative Price Test because it charged the end user more than the landlord's cost of the water, but end user prices would have increased if the landlord had been required to suspend service and allow the service to default to the incumbent utility.

Further, a price test is not justified based on an assumption that Commission regulation is inherently superior to alternatives such as private contracts. As IEU-Ohio/OHA/OMA and BOMA demonstrated in their comments and applications for rehearing, various commercial arrangements are not subject to Commission regulation, there is not a demonstrated need for regulation of those arrangements, and the application of regulation would impose unwarranted costs on the end users without any demonstration that the public interest would be improved.

III. THE COMMISSION SHOULD REJECT THE RECOMMENDATIONS THAT THE COMMISSION SHOULD MAKE SUMMARY FINDINGS CONCERNING THE STATUS OF CERTAIN PARTIES OR ACTIVITIES

In OCC's first assignment of error, it argues that the Commission erred by failing to summarily conclude that "certain submeterers" are public utilities. OCC Application for Rehearing at 2-3. Coming at the same question from the other direction, Nationwide Energy Partners seeks rehearing on the basis that the Commission should summarily treat submetering companies as not subject to Commission jurisdiction. NEP Application for Rehearing at 1 (Assignments of Error 1 and 2) and Memorandum in Support at 2, 4-14 (Jan. 6, 2017). The Commission should reject the assignments of error of OCC and Nationwide Energy Partners because presumptively concluding that an entity is or is not

a public utility would violate the rights of persons to due process in Commission proceedings and Commission precedent.

The determination of an entity's status as 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), and the determination of an entity's status as a public utility may be presented to the Commission in different ways. For example, the Commission may open an investigation to determine the legal status of the entity if it learns that an entity is operating in a manner that suggests that it is a utility. See, e.g., *In the Matter of the Commission-Ordered Investigation of Island Productions, LLC*, Case No. 16-1100-WS-COI, Staff Report of Investigation Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (May 25, 2016). An affected customer also may seek a determination that an entity is providing utility services without complying with the requirements of Ohio law through a complaint case. *Whitt v. Nationwide Energy Partners, LLC*, Case No. 15-697-EL-CSS, Complaint (Apr. 10, 2015). Alternatively, an entity may seek a determination that it is not a public utility subject to the Commission's jurisdiction. 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).

As the recent review of Nationwide Energy Partners has demonstrated, the determination whether an entity is a public utility subject to Commission jurisdiction may be a contested issue. If the status of the entity is contested, hearing rights attach and the Commission is statutorily bound to address the matter on the record before it. R.C. 4903.02 to 4903.09. The positions urged by OCC and Nationwide Energy Partners that

the Commission can summarily conclude whether certain entities are subject to its jurisdiction without reference to the procedural rights set out in Ohio law would constitute a fundamental violation of those statutory rights.

IV. THE COMMISSION SHOULD REJECT OCC’S CLAIM THAT THE COMMISSION MISPLACED THE BURDEN OF PROOF ON THE CONSUMERS TO RAISE THE ISSUE OF AN ENTITY’S STATUS AS A PUBLIC UTILITY

In its second assignment of error, OCC seeks rehearing because it claims that the Commission erred by placing the burden on consumers to raise the issue of utility status on a case-by-case basis. OCC Application for Rehearing at 3.

If a customer of an entity files a complaint alleging that an entity is operating unlawfully as a utility, the customer has the burden of proving by a preponderance of evidence that the facts it is alleging are true. *City of Reynoldsburg, Ohio v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, Opinion and Order at 3 (Apr. 5, 2011) (burden of proof rests on the complainant). That burden rested with the customer before the Finding and Order, and it is not changed. Therefore, the Commission should deny rehearing of OCC’s second assignment of error because it misstates the applicable law.

V. OCC’S RECOMMENDATION THAT THE COMMISSION IMPOSE ON OHIO’S DISTRIBUTION UTILITIES A DUTY TO ADOPT TARIFFS TO RESTRICT RESALE OF UTILITY SERVICES MUST CONFORM TO R.C. 4928.40(D) AND STATE POLICY

In its third assignment of error, OCC argues that the Commission may indirectly regulate submeterers by requiring “public utilities’ tariffs (or requiring tariffs to be enforced) to ban abusive submetering practices.” OCC Application for Rehearing at 9.³ According to OCC, its recommendation is consistent with the Commission’s general

³ OCC has filed a complaint seeking similar relief. That complaint remains pending. *Office of the Ohio Consumers’ Counsel v. Ohio Power Company*, Case No. 16-782-EL-CSS, Complaint (Apr. 12, 2016) (“OCC Submetering Complaint”).

authority to supervise public utilities under R.C. 4905.06. *Id.* OCC, however, fails to temper its recommendation to conform to statutory requirements and state public policy.

R.C. 4928.40(D) provides that “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.” In *Brooks*, a case decided before the restructuring of electric services in 1999 legislation, moreover, the Commission struck down as against public policy restrictions on resale contained in a Toledo Edison Company tariff. *Brooks v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS, Entry at 13-17 (May 8, 1996). The policy expressed in *Brooks* is also restated in the state electric services policy: “It is the policy of this state to ... ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers.” R.C. 4928.02(C). The State has adopted a similar policy in regard to the provision of natural gas. R.C. 4929.02(A)(3). Thus, OCC’s recommendation that public utilities modify their tariffs to impose resale restrictions must be tempered by the requirement that any restrictions comply with Ohio law and policy.

VI. OCC’S RECOMMENDATION THAT THE COMMISSION IMPOSE CONSUMER PROTECTIONS ON A FINDING THAT AN ENTITY FAILED THE RELATIVE PRICE TEST IS UNLAWFUL AND UNREASONABLE

In its sixth assignment of error, OCC argues that the Commission erred because the Commission did not subject an entity identified as a submeterer to Commission regulation if it fails the Relative Price Test. OCC Application for Rehearing at 3. This assignment of error should be denied for two reasons.

First, the Relative Price Test is so fundamentally flawed as to be both illegal and unreasonable. IEU-Ohio/OHA/OMA Application for Rehearing at 13-17. Thus, it would

be unlawful and unreasonable to apply Commission regulation to an entity because it “failed” the Relative Price Test.

Second, the sixth assignment of error is based on the same faulty assumption that infects OCC’s first assignment of error. By invoking the term “submeterer,” OCC assumes that the entity is a public utility. That determination, however, is an issue of fact that should be addressed on the merits of the individual case. Merely labelling an entity a “submeterer” does not answer the applicable legal question whether the entity is functioning as a utility.

VII. THE COMMISSION SHOULD LIMIT THE SCOPE OF THE PROCEEDING TO THE PROVISION OF SUBMETERING TO RESIDENTIAL CUSTOMERS

In its fourth assignment of error, OCC urges the Commission to limit the applicability of the Finding and Order to submeterers that resell and redistribute public utility services to residential customers. If the Commission continues to affirm its expansion of jurisdiction contained in the Finding and Order over the objections of IEU-Ohio, the OHA, and OMA, the Commission should clarify that the modifications of the *Shroyer Test* should be applied to the provision of submetered utility services to residential customers.

Initially, the record in this proceeding does not provide a factual basis for extending the modifications of the *Shroyer Test* to the provision of services to commercial and industrial customers.⁴ As noted in the comments of IEU-Ohio, commercial and industrial

⁴ 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 arrangements. 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. *OCC Submetering Complaint*, 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

customers have entered into shared service arrangements for years under the existing regulatory structure and have not resorted to or needed Commission intervention. Initial Comments of Industrial Energy Users-Ohio at 8-9 (Jan. 21, 2016). 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 application of the Relative Price Test would be wholly unworkable in the context of commercial and industrial shared services agreements. These complex agreements often provide for several services, which make the comparability of utility rates to the contract rates meaningless. IEU-Ohio/OHA/OMA Application for Rehearing at 16-17.

The modifications of the *Shroyer Test* in the Finding and Order are not consistent with the Commission's statutory authority or Commission precedent. If the Commission, nonetheless, intends to go down this new path, it should limit the application of the modified *Test* to residential submetering.

VIII. CONCLUSION

For the reasons discussed above, the Commission should reject several of the assignments of error of OCC, Nationwide Energy Partners, and the EDUs.

Respectfully submitted,

/s/ Frank P. Darr

Frank P. Darr (Reg. No. 0025469)
Matthew R. Pritchard (Reg. No. 0088070)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor

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 Test to non-residential shared service arrangements is not warranted even if the Test is lawful and reasonable.

Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
fdarr@mwncmh.com
mpritchard@mwncmh.com

ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

/s/ Richard L. Sites

Richard L. Sites
Regulatory Counsel
OHIO HOSPITAL ASSOCIATION
155 East Broad Street, 3rd Floor
Columbus, OH 43215-3620
Telephone: (614) 221-7614
Facsimile: (614) 221-4771
rick.sites@ohiohospitals.org

ON BEHALF OF THE OHIO HOSPITAL ASSOCIATION

/s/ Robert A. Brundrett

Robert A. Brundrett (0086538)
Ohio Manufacturers' Association
33 N. High St., 6th Floor
Columbus, OH 43215
Telephone: (614) 224-5111
Fax: (614) 469-4653
rbrundrett@ohiomfg.com

**ON BEHALF OF OHIO MANUFACTURERS'
ASSOCIATION**

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 17, 2017.

/s/ Frank P. Darr

Frank P. Darr

aemerson@porterwright.com
campbell@whitt-sturtevant.com
cmooney@ohiopartners.org
dclearfield@eckertseamans.com
dborchers@bricker.com
frice@spectrumutilities.com
gkrassen@bricker.com
ibatikov@vorys.com
jodi.bair@occ.ohio.gov
jbowser@mwncmh.com
joliker@igsenergy.com
jeckert@firstenergycorp.com
ktreadway@oneenergylc.com
bojko@carpenterlipps.com
slesser@calfee.com
whitt@whitt-sturtevant.com
mcorbett@calfee.com
mjsatterwhite@aep.com
bryce.mckenney@puc.state.oh.us

mjsettineri@vorys.com
msmckenzie@aep.com
stnourse@aep.com
mhpetricoff@vorys.com
glpetrucci@vorys.com
Randall.Griffin@aes.com
rick.sites@ohiohospitals.org
rbrundrett@ohiomfg.com
sstoner@eckertseamans.com
sdismukes@eckertseamans.com
Amy.Spiller@Duke-Energy.com
dstinson@bricker.com
terry.etter@occ.ohio.gov
elizabeth.watts@duke-energy.com
mswhite@igsenergy.com
william.wright@ohioattorneygeneral.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/17/2017 3:04:05 PM

in

Case No(s). 15-1594-AU-COI

Summary: Memorandum of Industrial Energy Users-Ohio, Ohio Hospital Association, and Ohio Manufacturers' Association Opposing Applications for Rehearing electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio