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 CONTRA APPLICATIONS FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE OHIO POVERTY LAW CENTER

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I. INTRODUCTION

Thousands of Ohioans have been victimized by the abusive pricing, disconnection, and collection practices of certain submetering entities that provide residential utility service. The Public Utilities Commission of Ohio ("PUCO") should do all it can to shield residential consumers from such harm. It is imperative that residential customers of submeterers are protected from unreasonable prices and are afforded other consumer protections embedded in the PUCO's rules and Ohio law.

On December 7, 2016, the PUCO issued its Finding and Order ("Order") in this case, expanding the application of the *Shroyer*[1] test to submeterers.[2] On January 6, 2017, the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Poverty Law Center ("OPLC") filed an application for rehearing of the PUCO's Order. OCC and OPLC demonstrated that the Order does not do enough to protect residential consumers and stop the abusive practices of certain submeterers that resell or redistribute public

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[1] *In the Matter of the Complaint of Melissa E. Inscho v. Shroyer's Mobile Homes,* Case No. 90-182-WW-CSS, Opinion and Order (February 27, 1992).

[2] Order at ¶1.

utility services to residential consumers.[3] Several other parties also filed rehearing requests.[4]

In its rehearing application, Nationwide Energy Partners, LLC ("NEP") asserts that the PUCO lacks jurisdiction over submeterers. NEP misstates facts and misapplies the law. Although NEP, a third party submeterer, equates itself with property-owning landlords, it is not a property-owning landlord.[5] Thus, the cases cited by NEP regarding PUCO jurisdiction over landlords that provide utility service to their tenants does not apply to NEP. Next, NEP incorrectly argues that the PUCO does not have jurisdiction over entities that submeter utility services to consumers.[6] Further, NEP claims that the PUCO cannot consider the rates charged by submeterers before jurisdiction is considered.[7] NEP also asserts that the PUCO cannot subject all entities to the *Shroyer* test[8] and challenges the creation of a rebuttable presumption to be used in the third prong of the *Shroyer* test.[9] Finally, NEP requests clarification that the compared rates in the third prong of the *Shroyer* test should be for specific utility services, excluding utility

[3] Application for Rehearing by the Office of the Ohio Consumers' Counsel and the Ohio Poverty Law Center (January 6, 2017) ("OCC/OPLC AFR").

[4] *See* Application for Rehearing of Nationwide Energy Partners, LLC (January 6, 2017) ("NEP AFR"); Joint Application for Rehearing of the Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio (January 6, 2017) ("BOMA AFR"); Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio, Ohio Hospital Association and Ohio Manufacturers' Association (January 6, 2017) ("Commercial Customers AFR"); 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 (January 6, 2017) ("Electric Utilities AFR"); Application for Rehearing of One Energy Enterprises LLC (January 6, 2017) ("One Energy AFR"); Application for Rehearing of Mark Whitt (January 6, 2017) ("Whitt AFR").

[5] *See* NEP AFR at 6-9.

[6] *Id.* at 10-14.

[7] *Id.* at 14-15.

[8] *Id.* at 16-17.

[9] *Id.* at 17-18.

services provided to common areas,[10] and that complainants should be required to include conclusive evidence of jurisdiction over submeterers in their complaints.[11]

The Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio (collectively, "BOMA") jointly sought rehearing of the Order. They seek to exclude from jurisdiction commercial landlords as public utilities.[12] The Industrial Energy Users-Ohio, Ohio Hospital Association, and Ohio Manufacturers' Association (collectively, "Commercial Customers") jointly applied for rehearing on similar grounds. They argue that the Order should be limited to submetering entities serving residential consumers and should exclude from PUCO jurisdiction arrangements for redistribution of utility services to nonresidential customers.[13]

One Energy Enterprises LLC ("One Energy") applied for rehearing on grounds that the Order should clarify that it does not apply to behind-the-meter distributed generation.[14] Additionally, Mr. Whitt sought clarification as to the applicability of the Order and whether the Order is even necessary in light of existing Ohio law.[15] Finally, Ohio Power Company, Duke Energy Ohio, Inc., and Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively,

[10] *Id.* at 18-20.

[11] *Id.* at 20-21.

[12] BOMA AFR at 8-10.

[13] Commercial Customers AFR at 11, 12.

[14] One Energy AFR at 2.

[15] Whitt AFR at 3.

"Electric Utilities") asked the PUCO to revise its test for when to apply the rebuttable presumption.[16]

OCC and OPLC hereby file this memo contra to several salient issues raised in the applications for rehearing. Failure to address any particular issue should not be deemed as OCC and OLPC supporting or opposing that issue.

II. ARGUMENT

A. The PUCO has authority to determine jurisdiction over submeterers and may use a multifactorial test to assist in its determination and to protect consumers.

NEP argues that the Order is unlawful and unreasonable because it failed to perform any legal analysis as to the scope of its jurisdiction over submeterers.[17] Without citing any supporting authority, NEP asserts that Supreme Court of Ohio precedent holds that the PUCO has no express authority to regulate the reselling of utility services. NEP is wrong. Its application for rehearing should be denied.

Not only is NEP's interpretation of governing statutes and case law incorrect, its assertion omits the category of submeterers who, like itself, are primarily in the business of reselling and redistributing utility services to residential consumers and who are not landlords. NEP's business practices meet the definition of a public utility in Ohio law.[18] NEP also fails the *Shroyer* test on its face, as NEP's primary business is to resell or redistribute public utility services to residential consumers.

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[16] Electric Utilities AFR at 2.

[17] NEP AFR at 4 (quoting Order at ¶3).

[18] R.C. 4905.02(A); R.C. 4905.03(C).

Further, NEP fails to explain why the PUCO does not have jurisdiction over resellers of public utility services like itself. NEP's reliance on R.C. 4905.03 for its position that the PUCO has no authority to regulate the reselling of utilities services is misplaced. As NEP recognizes, a public utility is defined as one engaged in the business of *supplying* electricity, water, and natural gas to *consumers* within the state.[19] NEP then states that the Supreme Court of Ohio has held that landlords who purchase utility services are "consumers" even if they resell those services. It uses the Court's findings regarding landlords to incorrectly conclude that "landlords or other similar entities that purchase utility service from a jurisdiction [sic] utility and resell those services to the ultimate end-user on a submetered basis are not suppliers, but are instead *consumers* under R.C. 4905.03, and therefore, cannot be public utilities under that statute."[20] NEP's position is baseless.

NEP appears to be attempting to equate itself with a landlord so that it may fall into the classification of a "consumer" to avoid the PUCO's jurisdiction. NEP, however, is ***not*** a landlord and NEP's primary business is the provision of utility services to residential consumers.

Landlords of multiple family dwellings have a property interest in that dwelling[21] and provide utility services to their individual tenants. In providing utility service to its customers, a landlord might be operating as a public utility or the utility service may be

[19] NEP AFR at 5.

[20] *Id*. at 8, 9 (emphasis in original).

[21] OCC/OPLC recognizes that some landlords may be operating as agent managers of the building owner and have no direct ownership in a residential building itself. However, because the agent landlord is acting on behalf of the building owner, the building owner's property interests are represented and flow through the agent manager.

ancillary to the landlord's primary business. Additionally, landlords also have statutory obligations to their tenants under R.C. 5321. One statutory obligation on landlords is to "[s]upply running water, reasonable amounts of hot water, and reasonable heat at all times" unless otherwise not required by law, or the water and heat are supplied directly by a public utility.[22] NEP has none of the statutory obligations of landlords.

To determine jurisdiction, the PUCO must review the facts to determine what is the utility provider's primary business. The *Shroyer* test does this.

In applying the *Shroyer* test, the PUCO will review the nature of the reseller's business to determine if its provision of utility service is ancillary to its primary business. Such was the case in *Pledger v. Publ. Util. Comm.*[23] In *Pledger*, the PUCO reviewed the nature of the landlord's business and found that the landlord's provision of utility service was ancillary to its primary business of being a landlord. The Supreme Court of Ohio agreed.

Conversely, certain submeterers like NEP cannot make the same arguments as the landlord in *Pledger*. NEP is primarily in the business of reselling or redistributing public utility services to residential consumers. NEP's primary business is ***not*** that of being a landlord. NEP does not have a fee interest in the multifamily dwellings in which it provides utility services. It also does not have landlord obligations to its customers. When a tenant's furnace goes out in the winter due to a mechanical failure, the tenant calls the landlord, *not* NEP. Similarly, NEP does not collect rent from tenants. In examining the nature of NEP's business in which it is engaged, on its face and under the

[22] R.C. 5321.04(A)(6).

[23] 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶ 37 (2006).

Shroyer test, the PUCO should find that NEP is primarily in the business of operating as a public utility.

NEP's reliance on *Pledger* is misplaced because it conflates those landlords whose provision of utility service is ancillary to their primary businesses with submeterers that are primarily in the business of reselling and redistributing utility service to residential consumers. NEP's proposition – that ***all*** entities that purchase utility services from a jurisdictional utility and resell those services to the ultimate customer on a submetered basis are consumers and therefore cannot be public utilities – unlawfully and unreasonably expands both the PUCO's and the Supreme Court of Ohio's precedent to exclude submeterers like itself from the PUCO's jurisdiction. Such an interpretation of case law would unlawfully impose a landlord-tenant relationship on residential customers who are served by companies that are solely in the business of selling utility service to owners of apartments and other multi-family dwellings. Thus, the PUCO must reject this proposition.

Further, NEP ignores the certified territory provisions of R.C. 4933.83. By NEP's own admission, it "specializes in the design, installation, operation and maintenance of private electric distribution systems for new multi-family housing communities. [It] also offers full service account management of electric and water utilities, including submetering systems, meter reading, billings and collections."[24] By installing and maintaining equipment, distribution facilities, and infrastructure on property owned by others, in a right of way, and/or easement, NEP is availing itself of

[24] *See* Nationwide Energy Partner's website on October 6, 2007 available at https://web.archive.org/web/20070106031944/http://www.nationwideenergypartners.com/about.html. The web domain nationwideenergypartners.com was registered on May 10, 2002 by Nationwide Energy Partners, Ltd.

special benefits available to public utilities. R.C. 4933.83(C) provides in pertinent part that "each electric supplier has the obligation and exclusive right to furnish electric service to electric load centers, wherever located, which it was serving on January 1, 1977, or which it had agreed to serve under lawful contracts in effect on or resulting from written bids submitted under bond prior to January 1, 1977, and no other electric supplier shall furnish, make available, or extend electric service to any such electric load centers."

Public utilities also have the ability to appropriate any right or interest in land, edifices, or buildings for the purposes of erecting, operating, or maintaining utility-related equipment.[25] When a submeterer installs, maintains, or operates metering and distribution systems on the land, edifices, or buildings, or any part thereof, of another (even with the owner's consent), it is directly availing itself to special benefits exclusively available to public utilities. This is a hallmark of operating as a public utility.

Accordingly, NEP (and other similarly-situated submeterers) has unlawfully constructed electric distribution facilities (appropriating the rights and interests in land and buildings to erect, operate and maintain utility equipment) and supplied electric service to residential consumers in the certified territories of local distribution utilities in violation of R.C. 4933.83. For these reasons, NEP's assignment of error should be denied.

[25] R.C. 4933.16 and R.C. 4933.151.

B. Assuming jurisdiction over submeterers that resell and redistribute utility services as their primary business is consistent with PUCO's precedent for protecting consumers from unreasonable and unlawful business practices.

In its second assignment of error, NEP argues that the Order ignores the Supreme Court of Ohio's precedent and is contrary to the PUCO's own precedent in *Shroyer*, *Toledo Edison*,[26] *Brooks*,[27] and *Pledger v. Capital Properties*.[28] But NEP is wrong. The cases on which NEP relies affirm that the PUCO generally does not have jurisdiction over *landlords* who resell or redistribute utility services to their tenants unless the landlord operates as a public utility. OCC and OPLC do not disagree with this position. However, NEP's reliance on these cases is misplaced because NEP is ***not*** a landlord.

In *Schroyer*, tenants of a mobile home park filed a complaint against their *landlord*, and the PUCO held that it lacked jurisdiction over landlords engaged in submetering and lacked the statutory authority to insert itself in the landlord-tenant relationship. NEP and other submeterers, however, cannot hide behind the landlord-tenant relationship when it comes to providing utility services to residential consumers. Under *Shroyer*, NEP's provision of utility services *cannot* be ancillary to the primary business of a being a landlord, because NEP is not the landlord. NEP is solely in the business of providing utility service. Consistent with *Shroyer*, the PUCO has stated that

[26] *Toledo Premium Yogurt, Inc., dba Freshens Yogurt v. Toledo Edison Co.*, Case No. 91-1528-EL-CSS.

[27] *Brooks v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS.

[28] *In the Matter of the Complaint of Tobi Pledger and Mary Sliwinski v. Capital Properties Management LTS*, Case No. 04-1059-WW-CSS. NEP AFR at 10-14.

it will look to the character of the business in which the entity is engaged in to make this determination.[29]

In *Toledo Edison*, a commercial shopping mall tenant filed a complaint against the mall manager that billed tenants for electrical service.[30] The complainant alleged the mall manager and related respondents, the "landlords," were acting as public utilities. In applying the *Shroyer* test against the *landlords*, the PUCO found that: (1) the landlords did not avail themselves to the benefits of public utilities; (2) did not provide electric service to the general public; and (3) the provision of electric service was ancillary to the landlords' primary business. Consequently, the complaint was dismissed.

Here, however, NEP's *primary* business is the provision of utility service. NEP provides its service to any and all landlords, and thus provides its service to the general public.[31] As such, NEP cannot rely on *Toledo Edison* for its position that the PUCO does not have jurisdiction over it or others like it.

Similar to *Toledo Edison*, *Brooks* involved a complaint between shopping mall tenants and their landlord.[32] The issue in *Brooks* was whether the PUCO had jurisdiction to enforce an electric utility's tariff provision that prohibited resale of electric service. On rehearing, the PUCO held that the tariff provisions as "applie[d] to the resale or redistribution of electrical service by a landlord to a tenant upon property *owned by the*

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[29] *See Indus. Gas. Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 21 N.E.2d 166 (1939), paragraph one of the syllabus (the Commission must examine the nature of the business in which an entity is engaged before it can determine if it is a public utility.).

[30] *In the Matter of the Complaint of Toledo Premium Yogurt, Inc. dba Freshens Yogurt v. Toledo Edison Co.*

[31] In addition, NEP provides the utility service at a profit, and thus cannot avail itself of the exception for non-profit electric companies in the definition of "public utility" found in R.C. 4905.02(A)(1).

[32] *In the Matter of the Complaint of Michael E. Brooks v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS (May 8, 1996).

landlord and where the landlord is *not otherwise operating as a public utility*, is so unreasonable from both a legal and practical standpoint as to be void."[33] NEP fails to acknowledge the limitations in *Brooks*. The PUCO reserved jurisdiction over resellers or redistributors of electric service by an entity *who did not own the tenant occupied property* and *landlords who operated as public utilities*. Therefore, NEP's reliance on *Brooks* fails.

In *Pledger v. Capital Properties*, a residential tenant filed a complaint against the owner of a residential apartment complex. Applying the *Shroyer* test, the PUCO found that the residential landlord's provision of water and sewer service to the tenant was ancillary to the landlord's primary business. Here, NEP does not provide any services other than provision of utilities. So *Pledger* is inapplicable.

In sum, none of the cases cited by NEP support its position that it is not a public utility. NEP is not a landlord and its primary business is providing utility services. It does not offer these services ancillary to any other business. Thus, it cannot escape regulatory oversight by the PUCO. NEP's request for rehearing on this issue must be denied.

C. The PUCO has the discretion to modify the *Shroyer* test and create a rebuttable presumption to protect consumers from the abusive practices of a company acting as a public utility.

NEP argues that the amount a submeterer charges consumers for submetered utility services is irrelevant to whether the PUCO has jurisdiction over the submeterer.[34] It further argues that the "reasonableness" of separate charges to consumers is only

[33] 171 P.U.R.4th 323 (emphasis added).

[34] NEP AFR at 15.

meaningful after jurisdiction had been found.[35] BOMA makes a similar argument.[36] Both NEP and BOMA misunderstand the PUCO's reliance on the level of charges assessed by submeterers, as the PUCO is using the level of the charges to create a rebuttable presumption under the third prong of the *Shroyer* test.

While the PUCO does have jurisdiction over rates charged for the resale or redistribution of utility services by submeterers who are not landlords and by landlords operating as public utilities, the Order clearly explained that it was modifying the third prong of the *Shroyer* test to create a rebuttable presumption. The PUCO determined that if the submetering entity[37] charges the customer a threshold percentage above the total bill charges for a similarly-situated customer served by the local public utility, then it will create a rebuttable presumption that the provision of utility service is *not* ancillary to the submeterer's primary business.[38] Contrary to NEP's and BOMA's claims, the PUCO did not imply that it would consider reasonableness of rates before determining jurisdiction. The PUCO only held that the rate a submeterer charges its customers would assist the PUCO in applying the third prong of the *Shroyer* test.

Additionally, NEP argues that the PUCO should clarify that the total bill charges for a similarly-situated utility customer will only be compared to the metered usage charges for the utility service received by the submeterer's customer, including other charges for common areas.[39] Charges for utility services to common areas are generally

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[35] *Id.*, citing *Shroyer* at *8.

[36] BOMA AFR at 5-7.

[37] That is, a "landlord, condominium association, submetering company, or any other similarly-situated entity…." Order at ¶17.

[38] *Id.* at ¶18.

[39] NEP AFR at 18-20.

beyond a residential consumer's control. Because landlords have a statutory obligation to keep all common areas of the premises in a safe and sanitary condition,[40] charges for utility services to common areas should be a cost to do business for the landlord or owner. As such, costs related to the provision of utility services to common areas should be included in rent. Hence, any charges for utilities in common areas are irrelevant to the determination of whether a submetering entity is a public utility.

NEP also contends that the creation of the rebuttable presumption in the Order unlawfully and unreasonably shifts the burden of proof to establish jurisdiction away from the complainant.[41] It argues that the burden of proof should always stay with the complainant and not be shifted to the respondent. Placing this burden on the thousands of residential consumers who are harmed by submeterers unlawfully operating as public utilities, such as NEP, is unjust and unreasonable.[42]

Because "reasonableness" of charges is not a consideration by the PUCO, NEP's and BOMA's requests for rehearing on this basis should be denied. Further, NEP's request to exclude charges for common areas when examining whether a rebuttable presumption is created should be rejected and rehearing on those grounds should be denied. NEP's request to shift the burden of proof to residential consumers should be rejected.

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[40] R.C. 5321.04(A)(3).

[41] NEP AFR at 17, 18.

[42] *See* OCC/OPLC AFR at 7 (the PUCO erred in unreasonably placing the burden on consumers to raise the issue on a case-by-case basis as to whether submeterers are operating as public utilities.).

D. The PUCO has jurisdiction to protect consumers by reviewing the activities of submeterers and apply the *Shroyer* test to determine if submeterers providing utility services to consumers are unlawfully operating as public utilities.

NEP contends that the *Shroyer* test should only apply "to utility customers that resell or redistribute public utility service and ***not*** to entities that are not the customers of the utility at the master meter."[43] BOMA, One Energy, and Commercial Customers all argue that the PUCO's finding that an entity is a public utility if it fails any prong of the *Shroyer* test violates Supreme Court of Ohio precedent.[44] However, the PUCO did not exceed the authority provided to it by the General Assembly to protect consumers by reviewing the activities of all submeterers and determining if they are unlawfully operating as public utilities.

Nonetheless, the PUCO has authority to review the activities of submeterers that provide utility services to consumers and to determine if those submeterers are unlawfully operating as public utilities. It is well settled that "the [PUCO] should be allowed, in the first instance, to determine its own jurisdiction and questions of fact arising thereunder."[45] Only by first reviewing the facts and determining jurisdiction under the *Shroyer* test, can the PUCO determine if submeterers are unlawfully operating as public utilities.

It is within the PUCO's discretion and authority to determine its own jurisdiction. The PUCO did just that in finding that the *Shroyer* test should be applied to entities that

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[43] NEP AFR at 17.

[44] BOMA AFR at 7, 8; One Energy AFR at 6; Commercial Consumers AFR at 6.

[45] *State ex rel. Cleveland Elec. Illum. Co. v. Pub. Utilities Comm'n*, 173 Ohio St. 450, 452, 183 N.E.2d 782, 784 (1962).

resell or redistribute public utility services to determine whether that entity is in fact operating as a public utility and whether it is doing so unlawfully.[46]

The PUCO recognized that the Supreme Court of Ohio held that "public utilities conduct their operations in such a manner as to be a matter of public concern."[47] The PUCO also recognized that when submeterers charge unreasonably high rates or charges for the resale or redistribution of utility service, it becomes a matter of public concern which requires the PUCO's intervention to protect the public's interest.[48] In accordance with the Court's precedent, the PUCO extended the *Shroyer* test, on a case-by-case basis, to determine whether a submeterer is operating as a public utility.[49] In doing so, contrary to Mr. Whitt's arguments,[50] the PUCO correctly recognized that other factors should be considered beyond the three factors of the *Shroyer* test in order to protect the public interest.

Finally, NEP's attempt to evade PUCO jurisdiction by arguing that the *Shroyer* test should be limited to only entities that are the customers of the local public utility and that take service through the master meter,[51] should also fail. In an apparent attempt to distinguish its activities from those of other submeterers, NEP is no longer assimilating itself to a landlord or "consumer." Instead, NEP claims to not be a customer of the local public utility at the master meter, and therefore arguing that it cannot possibly resell or

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[46] Order at ¶17.

[47] *Id.* at ¶19 citing *S. Ohio Power Co. v. Pub. Util. Comm.*, 110 Ohio St. 246, 143 N.E. 700 (1924); *A&B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 388, 596 N.E.2d 423 (1992).

[48] *Id.* at ¶19.

[49] *Id*. at ¶¶16-17.

[50] Whitt AFR at 8.

[51] *Id*. at 16.

redistribute any utility services. Even though a submeterer is allegedly not a customer of the local public utility taking service at the master meter, the submeterer could still be operating as a public utility. This is the very reason that the PUCO stated that it is extending the *Shroyer* test on a case-by-case basis to determine whether the submeterer is in fact operating as a public utility. NEP's attempt to distinguish between entities that are customers of the local public utility and entities that are not is without merit. Such arguments should be rejected.

The PUCO did not violate Ohio law in applying the *Shroyer* test to determinations as to whether submeterers are operating as public utilities. Rather, protecting residential consumers against unlawful or unreasonable charges and practices is a matter of public concern which requires PUCO intervention.

E. The PUCO did not act unreasonably in failing to require excessive information to be pled in a complaint.

Additionally, NEP contends that the PUCO should require any complaint regarding submetering to include sufficient information to allow the threshold jurisdictional issue to be addressed prior to the merits of the complaint.[52] This requirement is overly burdensome and unworkable. Complainants are not required to provide every piece of evidence supporting their claim in their complaint. The PUCO's rules require only that "reasonable grounds for complaint are stated."[53] Parties to a proceeding are afforded "ample rights of discovery."[54] Further, as stated by PUCO rule,

[52] NEP AFR at 20.

[53] R.C. 4905.26.

[54] R.C. 4903.082.

the discovery process is designed to permit parties "thorough and adequate preparation for participation in commission proceedings."[55]

NEP's suggested requirement would subject complainants to a heightened pleading standard, not found in PUCO rule or precedent, which is unjust and unreasonable. Consequently, NEP's request for rehearing on this issue should be denied.

F. The PUCO's Order does not amount to rulemaking.

BOMA and Commercial Customers' both allege that the PUCO has engaged in rulemaking and the Order amounts to a "rule."[56] They further allege that because the PUCO did not comply with the rulemaking procedure in R.C. 111.15, the Order is unlawful. They are wrong.

Engaging in statutory interpretation does not equate to rulemaking under R.C. 111.15. The PUCO's discussion of the *Shroyer* test in its Order is an exercise in statutory interpretation of an existing statute. It is also interpretation of PUCO precedent. Importantly, the statutory provision relied on by BOMA and Commercial Customers specifically excludes this type of statutory interpretation. R.C. 111.15(A)(1) provides: "Rule" does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code, any order respecting the duties of employees, **any finding, any determination of a question of law or fact in a matter presented to an agency**.[57]

[55] Ohio Adm. Code 4901-1-16(A).

[56] BOMA AFR at 10; Commercial Customers AFR at 17.

[57] R.C. 111.15(A)(1) (emphasis added).

"Statutory interpretation presents a question of law."[58] R.C. 111.15(A)(1) itself excepts from the "rule" definition the type of statutory interpretation in which the PUCO engaged in when deciding this case. Because the PUCO engaged in the exercise of statutory interpretation of R.C. 4905.03, its Order is not a "rule." The PUCO's Order does not establish new rules – it merely discusses and amends the factors of a test it has used for decades to assist in interpreting the statutory provision. Accordingly, BOMA's and Commercial Customers' request for rehearing on this issue should be denied.

III. CONCLUSION

The PUCO should take all practical and necessary measures to protect residential consumers from abusive submetering business practices. The PUCO's Order is a first step toward protecting residential consumers from being victimized by unreasonable and unlawful practices by submeterers. The proposed changes to the Order sought by NEP and others, discussed above, would weaken consumer protections that the PUCO may employ. Accordingly, the PUCO should deny rehearing as set forth herein. But because more consumer protections are necessary, the PUCO should grant rehearing as requested in the OCC/OPLC Application for Rehearing.

[58] *Indep. v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 18 (2014).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum Contra was served this 17th day of January 2017 by electronic mail upon the persons listed below.

/s/ *Terry L. Etter*
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Summary: App for Rehearing Memorandum Contra Application for Rehearing by The Office of the Ohio Consumers' Counsel and The Ohio Poverty Law Center electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.