

**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

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

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**FEBRUARY 3, 2017**

**ON BEHALF OF OHIO MANUFACTURERS'  
ASSOCIATION**

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In the Finding and Order, the Public Utilities Commission of Ohio (“Commission”) modified the third prong of the *Shroyer Test*, which the Commission approved in *In re Inscho v. Shroyer’s Mobile Homes*, Case Nos. 90-182-WS-CSS, *et al.*, Opinion and Order at 4 (Feb. 27, 1992) (“*Shroyer*” or “*Shroyer Test*” as appropriate), to include a rebuttable presumption that the provision of a utility service is not ancillary to a 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 a 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 (Dec. 7, 2017) (“Relative Price Test”). 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 Relative Price Test it has proposed, however, assumes that there is a basis for presuming that a

company is a public utility if the company's prices exceeds some yet-to-be-defined threshold. That presumption is not based on a rational relationship between the facts presumed and the facts established and is unworkable. Application for Rehearing of Industrial Energy Users-Ohio, Ohio Hospital Association, and Ohio Manufacturers' Association, Memorandum in Support at 13-17 (Jan. 6, 2017); Comments on the Relative Price Test of Industrial Energy Users-Ohio, Ohio Hospital Association, and Ohio Manufacturers' Association at 7-11 (Jan. 13, 2017) ("IEU-Ohio/OHA/OMA Comments"). Comments filed by interested persons on January 13, 2017 further demonstrate that there is not a principled means of determining the percentage.

The comments (along with the applications for rehearing filed a week earlier in this matter) demonstrate that a price test is the wrong measure for establishing whether an entity is functioning as a public utility and subject to the Commission's jurisdiction. The commenters cannot agree on even the starting point for applying a percentage markup. *Compare* Initial Comments of Nationwide Energy Partners, LLC at 2 (Jan. 13, 2017) (the Commission should apply the percentage threshold based on a comparison of the total bill charges for a similarly situated utility customer and the metered usage charges for the end user of that specific utility service) *with* Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 2 (Jan. 13, 2017) ("Commission should adopt a revised test that considers any submetering entity to be a public utility if [the entity] makes any profit or charges any markup to customers in reselling utility service"). This lack of agreement on even the starting point for applying the Relative Price Test highlights again the lack of a coherent connection between what is being proven and what is being

presumed. Price, or relative price, is not “meaningful” to the determination whether an entity is functioning as a public utility. *Shroyer*, at 4.

There being no express basis in Ohio law to support the establishment of a threshold, the comments of several residential consumer groups suggest that the Commission draw on the experience of other states to set the threshold percentage. Comments by Coalition on Homelessness and Housing in Ohio, Legal Aid Society of Southwest Ohio, LLC, Edgemont Neighborhood Coalition, and the Office of the Ohio Consumers’ Counsel, and Ohio Poverty Law Center at 7 (Jan. 13, 2017) (“OCC Comments”) (citing state utility commission decisions from Connecticut and New Jersey and an administrative rule from Oklahoma).

The materials relied upon by the residential consumer groups, however, do not support the adoption of a price test to establish the Commission’s jurisdiction. In the Connecticut case, for example, the agency opened the investigation following a legislative enactment requiring a review of submetered electric services; jurisdiction was established by the legislation. *Generic Investigation of Electric Submetering*, Docket No. 13-01-26, Decision (Conn. Pub. Util. Reg. Agency Aug. 6, 2014). In the New Jersey case, the state board first expressly determined that its jurisdiction was limited to provision of certain water services and then established a pilot submetering program with price provisions. *In the Matter of a Pilot Program Allowing Sub-Metering (Formerly Check-Metering) in Residential Properties Regulated by the New Jersey Housing and Mortgage Finance Agency*, 2005 NJ PUC Lexis 77, Decision at \*5-\*7 (N.J. Bd. Pub. Utils. Sept. 19, 2005). Finally, the Oklahoma rule relied upon by the residential consumer groups restricts the price of water provided to residential submetered customers, but the price of the service

is not a factor for determining whether the service is regulated. Okla. Admin. Code § 165:35-13-7. In summary, the residential consumer groups' reliance on the efforts of other states to impose price limitations on submetering ignores that in each instance the agency determined its jurisdiction based on a legislative directive or the functions of the service provider; price or relative price was not the basis for establishing jurisdiction.

Apart from demonstrating that the Relative Price Test is unreasonable and unworkable, the comments also support limiting the application of the modifications of the *Shroyer Test* to residential submetering. If the Commission does not reverse its modification of the third prong of the *Shroyer Test* to include a Relative Price Test,<sup>1</sup> extension of the modifications to nonresidential arrangements is not warranted because these arrangements generally do not involve public interest concerns. Additionally, Commission intervention would inject uncertainty into long standing commercial practice, causing substantial disruption and cost and placing an additional and unnecessary drain on Commission resources. See, e.g., IEU-Ohio/OHA/OMA Comments at 3-4; Joint Comments of the Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio at 5-9 (Jan. 13, 2017); OCC Comments *passim*. See *Shroyer*, at 5 (noting the practical problems associated with an extension of jurisdiction to certain tenant arrangements).

Finally, the Relative Price Test is not needed. To the extent that a submeterer is engaged in the provision of residential utility services in a way that affects the public interest, the Commission has the authority to assert jurisdiction over the entity. R.C.

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<sup>1</sup> See, also, Joint Application for Rehearing of the Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio at 1 (Jan. 6, 2017) (assignment of error C). In response to applications for rehearing, the Commission has granted rehearing for further consideration. Entry on Rehearing (Feb. 1, 2017).

4905.02 and 4905.03. The Commission does not need to apply an unlawful and unreasonable price test to establish its jurisdiction.

Respectfully submitted,

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**ON BEHALF OF OHIO MANUFACTURERS'  
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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 these *Reply Comments of Industrial Energy Users-Ohio, Ohio Hospital Association, and Ohio Manufacturers' Association on the Relative Price Test* upon persons that the Commission has identified. Service by email has been made to the persons listed below on February 3, 2017.

/s/ Frank P. Darr

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Summary: Reply Comments 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 and Ohio Hospital Association and Ohio Manufacturers' Association