BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Cynthia Wingo,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 16-2401-EL-CSS
	)	
Nationwide Energy Partners, LLC, et al,	)	
	)	
Respondents.	)	

COMPLAINANT'S MEMORANDUM CONTRA
APPLICATION FOR REHEARING OF BORROR PROPERTIES MANAGEMENT

Borror Properties Management, LLC seeks rehearing of the September 11, 2017 Entry granting a motion for leave to file an amended complaint. The Entry was subject to interlocutory appeal—not rehearing—and the deadline for seeking interlocutory appeal has long expired. Borror's application is therefore procedurally barred. It should be denied for this reason alone.

To the extent Borror's pleading were considered as a motion to dismiss itself as a respondent, it should also be denied. The ultimate question in this case is "whether the landlord, condominium association, submetering company, or any other similarly-situated entity is operating as a public utility." Case No. 15-1594-AU-COI, Finding and Order (Dec. 7, 2016) ¶17. NEP denies that it was Ms. Wingo's utility service provider. If NEP was not the provider, some other entity was. The only other candidates are Ms. Wingo's former landlord and the property owner. Borror was Ms. Wingo's landlord. Whether or not it is ultimately found to be the service provider, Borror is a proper respondent and must remain in this case.

ARGUMENT

Borror seeks rehearing under R.C. 4903.10. The statute authorizes rehearing of any "order" made "by the public utilities commission." The Entry granting leave to file the Second Amended Complaint is neither an "order" nor represents a decision "by the [Commission]." The Entry represents a procedural ruling by the attorney examiner. The rehearing statute does not apply. *See Application of Dominion East Ohio*, Case No. 05-219-GA-GCR, Entry (Jan. 9, 2006) ¶ 5 ("The proper remedy for seeking relief from an entry issued by an attorney examiner is with an interlocutory appeal filed pursuant to Rule 4901-1-15 . . . ."); *Buckeye Energy Brokers v. Palmer Energy Co*., Case No. 10-693-GE-CSS, Entry on Rehearing (Feb. 3, 2012) ¶ 43 ("To the extent Buckeye sought to object to the attorney examiner's Entry of March 30, 2011, it should have filed an interlocutory appeal of that ruling . . . .").

If the application were considered a motion to dismiss Borror as a respondent, it would be subject to R.C. 4905.26. Under R.C. 4905.26, "if it appears that reasonable grounds for complaint are stated, the commission ***shall*** fix a time for hearing and ***shall*** notify complainants and the public utility thereof." (Emphasis added). In deciding whether reasonable grounds for complaint have been stated, "all material allegations of the complaint must be accepted as true and construed in favor of the complaining party." *Office of the Ohio Consumers' Counsel v. Dominion Retail Inc.,* Case No. 09-257-GA-CSS, Entry (July 1, 2009) ¶ 7. R.C. 4905.26 does not authorize summary judgment. *Dennewitz v. Dominion East Ohio*, 07-517-GA-CSS, Entry (Oct. 24, 2007) ¶ 5 ("There is no summary judgment provision in the Commission's [Rules of Practice].").

Borror's attempt to have disputed facts decided in its favor without a hearing is therefore improper. The Second Amended Complaint alleges that the respondents, individually or in

concert, provided public utility service to Ms. Wingo, in violation of Ohio law. Reasonable grounds for the complaint are stated, and Borror's filing—whatever called and however treated—must be denied.

A. The application is procedurally defective.

Rule 4901-1-14 allows "an attorney examiner" to rule upon "any procedural motion or other procedural matter." The motion for leave to amend pertained solely to a procedural matter, *i.e.* whether "good cause" existed for Ms. Wingo to file an amended complaint. The attorney examiner found that good cause existed to grant leave to amend. Granting the motion merely authorized the filing of a new complaint and did not settle any claims or defenses of any party. New parties (such as Borror) were and are free to assert whatever defenses they wish.

The Attorney Examiner ordered that the Entry granting leave to amend be served on all new parties, including Borror. Entry ¶ 18. Borror could have sought an interlocutory appeal of the Entry but did not, and the five-day deadline for doing so has long passed. *See* Rule 4901-1-15, O.A.C.

Borror does not challenge the Attorney Examiner's authority to issue a ruling on the motion for leave to amend. Nor can it. The decision to grant leave to amend is subject to an abuse of discretion standard, *i.e.,* "more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Wilmington Steel Prod., Inc. v. Cleveland Elec. Illum. Co*., 60 Ohio St. 3d 120, 121–22 (1991) quoting *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87 (1985). Borror's attack on the merits of the Entry falls far short of establishing that discretion was abused in issuing it.

Borror had full knowledge that Ms. Wingo was seeking to amend her complaint. It knew that the attorney examiner had granted leave to amend. Borror waited too long to challenge that decision.

B. The arguments raised in the application also fail on the merits.

If the Commission treats Borror's application as a motion to dismiss, it should deny the motion. Borror raises two arguments. First, it asserts that Ms. Wingo "fails to allege any facts indicating that Borror, as property manager, engaged in any conduct violative of Chapter 4905 of the Revised Code." App. Rehearing at 6-7. Second, it argues that "[a]pplying the *Shroyer Test* here should leave no doubt that Borror, which is not a landlord," meets none of the three *Shroyer* factors. Ms. Wingo will address the second argument first.

1. Borror was Ms. Wingo's landlord.

The Management Agreement Borror submits with its filing requires Borror to manage the Gateway Lakes apartments and collect rent from tenants. App. Rehearing, Management Agreement ¶¶ 1.1, 2.1(b). The Management Agreement establishes, as a matter of law, that Borror was Ms. Wingo's "landlord." Under the Ohio Landlord Tenant Act, "'Landlord' means the owner, lessor, or sublessor of residential premises, ***the agent of the owner***, lessor, or sublessor, ***or any person authorized by the own****er*, lessor, or sublessor ***to manage the premises or to receive rent*** from a tenant under a rental agreement." R.C. 5321.01(B) (emphasis added).

The Shroyer Test expressly applies to a "landlord," and Borror was Ms. Wingo's "landlord"—not only as a matter of law, but as a matter of fact. As shown in Ms. Wingo's lease renewal documents (Second Amend. Compl., Ex. A), the name and logo "Borror Properties" appears at the top of each document. The first page of the lease (titled "Rental Agreement") lists "Gateway Lakes Acquisition, LLC, Owner, Borror Properties, Agent, hereinafter designated

Lessor" as the entities entering into the lease. The signature page lists "Borror Properties, Agent for Owner" as the "Lessor." The Lease Renewal Addendum document, however, lists "Borror Properties" (and ***only*** Borror Properties) as the "Lessor"—as does every other addendum included with the renewal documents.

In short, Borror falls squarely within the definition of "landlord" under Ohio law. Its claim that it is not a landlord must be rejected.

2. As a landlord, Borror is subject to the *Shroyer* Test.

Borror, then, is a landlord, and the *Shroyer* Test expressly applies to "landlords." As the landlord of an apartment complex where utility reselling occurred, Borror is thus a proper respondent. Whether Borror can eventually show on the merits that someone else resold service is irrelevant to whether Ms. Wingo has properly alleged a claim against it. ***Someone*** resold utility services to Ms. Wingo, perhaps more than one, and certainly so long as NEP continues to deny that it was the reseller, every "landlord," "submetering company" and "similarly situated entity" in a position to function as a reseller to Ms. Wingo is a proper respondent in this case.

The first prong of the *Shroyer* Test asks whether the "landlord" has manifested an intent to become a public utility. Borror apparently assumes that "landlord" is limited to the property owner, but the *Shroyer* decision neither limited the term to owners, nor suggested that the Commission intended a narrower definition of "landlord" than the one provided under the Landlord Tenant Act, which expressly encompasses "agents" of the owner as well as "any person authorized by the owner . . . to manage the premises or to receive rent." R.C. 5321.01(B). Even if *Shroyer* intended to adopt a narrower definition, the COI orders expressly "extend" *Shroyer* to include not only "landlords," but entities with no ownership interest in the property

being served, such as "submetering companies" and entities "similarly-situated" to landlords.[1] Case No. 15-1594-AU-COI, Finding and Order (Dec. 7, 2016) ¶ 17; Second Entry on Rehearing (June 21, 2017) ¶ 32.

All owners are landlords, but not all landlords are owners. In any event, "[i]f ***any entity*** resells or redistributes public utility service, the Commission will apply the *Shroyer Test* to that entity to determine if it is operating as a public utility . . . ." Case No. 15-1594-AU-COI, Finding and Order (Dec. 7, 2016) ¶ 17 (emphasis added). Borror surely cannot deny it is "an entity." The Commission has made clear: liability follows ***actions***, not ***identity***. If Borror can prove it had nothing to do with the reselling of utility services to Ms. Wingo, it may escape liability. It cannot do so based on some narrow, technical self-definition.

3. The Second Amended Complaint alleges facts sufficient to establish reasonable grounds for complaint against Borror.

Borror argues that Ms. Wingo "fails to allege any facts indicating that Borror, as property manager, engaged in any conduct violative of Chapter 4905 of the Revised Code." App. Rehearing at 6-7. Its chief complaint is that Ms. Wingo has not parsed-out Borror's conduct from the conduct of other respondents. Ms. Wingo may be required to do that after discovery and at hearing, but she is not required to do so in her pleading. As grows clearer all the time, NEP and its collaborators have woven a remarkably complex and misleading tapestry of entities and affiliates to camouflage their lucrative unregulated "loophole"; untangling that web without discovery and without a hearing would be impossible.

[1] The landlord-tenant relationship between Borror and Ms. Wingo does not mean that Ms. Wingo's claims are subject to the Landlord Tenant Act. Ms. Wingo alleges that her former landlord, by itself or in concert with others, provided public utility service. The Commission has jurisdiction to decide this issue. *See Pledger v. Public Util. Comm'n*, 109 Ohio St.3d 463, 2006-Ohio-2989 ¶ 1 (appellants "were tenants of apartment units at Hunt Club Apartments.").

Borror is essentially objecting to having to lie in the bed that both it and NEP have made. Ms. Wingo's original complaint named only NEP as a respondent. In Ms. Wingo's case as well as others, NEP has adamantly denied that ***any*** tenant of ***any*** community is a customer of NEP. In pending civil litigation, NEP has argued that "the Landlord, not NEP, is responsible for providing utility services" to tenants. *Wuerth et al. v. Nationwide Energy Partners*, Franklin Cty. Ct. Comm. Pleas, Case No. 16 CV 143, NEP Reply Mem. Support of Summary Judgment (Aug. 30, 2017) at 4. Likewise, in its motion to dismiss in this case, NEP claims that "[Gateway Lakes Apartments], and not NEP, has overall responsibility for utility service to GLA's apartment complex," and that NEP is "not a party to any contract with a public utility to provide utility service to Gateway Lakes." Motion to Dismiss (Sept. 29, 2017) at 2; Exhibit 1 ¶ 10. The very next paragraph of NEP's affidavit, however, discloses that contrary to NEP's motion to dismiss, there ***is*** such a contract between AEP and NEP. Exhibit 1 ¶ 11. The attachments to the affidavit confirm the same thing. But because NEP says it pays AEP "on behalf of GLA," the Commission is asked to believe that the bill actually evidences a contract between GLA and AEP, rather than the direct NEP-AEP relationship the documents so clearly establish.

Given NEP's repeated finger-pointing at landlords, Ms. Wingo was all but forced to bring her former landlord into this case. Ms. Wingo's original lease lists "Gateway Lakes Apartments" as the landlord, and NEP issued a final bill to Ms. Wingo "on behalf of your community, Gateway Lakes Apartments." Second Amend. Compl. Ex. B. There is no such legal entity as "Gateway Lakes Apartments." *Id*. ¶ 5. Ms. Wingo renewed her lease by signing documents variously listing both Borror ***and*** GLA as the landlord, and both of these entities are listed with the Ohio Secretary of State—whose records, by the way, reveal that Borror is the registered

agent for GLA. The Second Amended Complaint was served upon GLA and Borror at the same address, yet one entity has appeared in this case and the other has not.

Borror's first official act since making an appearance is to disclaim any contractual relationship with NEP "relating to ***this*** Property." (Emphasis added.) It denies any ownership interest in Gateway Lakes or any affiliation with the owner—which is flatly contradicted by its own Secretary of State filings. Regardless, Borror claims it was merely a "property manager." The property owner (GLA), meanwhile, has not appeared in this case—notwithstanding service of the complaint on Borror, GLA's registered agent for service.

All respondents in this case were happy to take Ms. Wingo's money when she lived at Gateway Lakes. The two respondents who have bothered to make an appearance both point the finger to the respondent who has not. And none of the respondents are apparently capable of taking any action in their own name. Everyone is someone else's "agent" or has otherwise acted "on behalf of" someone else. All these post-complaint revelations of "agency" are sufficient grounds alone to keep each of the three respondents in this case. *See Dunn v. Westlake*, 61 Ohio Sr.3d 102, 106 (1991) ("[W] here the existence of the agency and the identity of the principal are unknown to the third party, the dealing is held to be between the agent and the third party and the agent is liable[.]") (citations omitted).

Which entity had service responsibility to Ms. Wingo should not be a disputed issue, but it is. It is a disputed issue because NEP and landlords stood to benefit from a convoluted legal framework that made it difficult to follow the money and to identify the real actor. One minute, they allege to be acting on another's behalf; another, they have become utter strangers. Whatever suits the present moment. Dismissing any one of them before discovery would play right into their sophisticated game of keep away.

To be clear, this is not to say every entity will be shown to have violated the law. Discovery in this case may eventually warrant dismissal of some respondents or the addition of others. The point is that at this stage of the proceeding, the current respondents' shell games and finger-pointing do not excuse any one of them from answering and defending the allegations in the complaint.

CONCLUSION

Borror's procedurally and substantively flawed application for rehearing should be denied. The Second Amended Complaint conforms to the *Shroyer* Test by alleging that Ms. Wingo's "landlord" (Borror and GLA) and a "submeter company" (NEP) furnished public utility service. The respondents' culpability for the activities alleged in the complaint, both individually and collectively, can only be determined "after the development of an evidentiary record in a complaint case." Case No. 15-1594-AU-COI, Second Entry on Rehearing (June 21, 2017) ¶ 31 (emphasis added). The application for rehearing should be denied.

Dated: October 20, 2017

Respectfully submitted,

s/ Mark A. Whitt

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CERTIFICATE OF SERVICE

This document was filed via the Commission's e-filing system on October 20, 2017. Parties who have subscribed to electronic service will receive notice of this filing from the Commission. Service is also being made this day to the following persons by email:

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s/ Rebekah J. Glover

Summary: Memorandum Contra Borror Properties Management, LLC's Application for Rehearing electronically filed by Ms. Rebekah J. Glover on behalf of Ms. Cynthia Wingo