

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**REPLY IN SUPPORT OF AMENDED MOTION TO DISMISS
OF NATIONWIDE ENERGY PARTNERS, LLC**

I. INTRODUCTION

This case has been pending since December 2016. After the Commission issued its Second Entry in the Submetering Investigation on June 21, 2017, Nationwide Energy Partners, LLC (“NEP”) presented probative evidence that it is not a jurisdictional public utility over which the Commission has subject matter jurisdiction pursuant to the *Shroyer Test*. NEP brought this evidence to the Commission through a motion to dismiss—a means that the Commission has repeatedly recognized is appropriate for resolving the question of its subject matter jurisdiction under the *Shroyer Test* without the need for a hearing.

In her Memorandum Contra, Complainant neither specifically disputes the evidence submitted by NEP nor establishes there are any further issues regarding the application of the *Shroyer Test* that remain to be resolved at a hearing. Instead, Complainant argues that the *Shroyer Test* is not intended to determine the Commission’s subject matter jurisdiction over the Complainant’s allegations, and relatedly, that NEP’s motion to dismiss is not the proper vehicle to resolve the question of the Commission’s subject matter jurisdiction in this case.

Complainant is wrong. The *Shroyer Test* is, in fact, the test by which the Commission determines its limited subject matter jurisdiction to hear a complaint concerning submetering.

Further, as repeatedly affirmed by the decisions of the Commission and the Supreme Court of Ohio, a motion to dismiss is the proper means to resolve the question of subject matter jurisdiction under the *Shroyer Test*. And in reviewing a motion to dismiss, the Commission may consider *any pertinent evidence*, which allows the Commission to make an informed decision regarding its subject matter jurisdiction by going beyond the pleadings and considering the available evidence.

Because NEP's Amended Motion to Dismiss is supported by evidence that it is not a jurisdictional utility under the *Shroyer Test*—evidence that the Complainant does not specifically challenge—the Commission should dismiss the Complaint against NEP.

II. ARGUMENT

A. The *Shroyer Test* determines the Commission's subject matter jurisdiction to hear complaints against entities in circumstances involving submetering.

The Complainant asserts that “*Shroyer* does not function as a screening mechanism for determining subject matter jurisdiction....” (Memo. Contra at 3). In fact, resolving the threshold question of subject matter jurisdiction is precisely what the *Shroyer Test* is intended to do. “Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits.” *Morrison v. Steiner*, 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972). The Commission, “as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly.” *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993), citing *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302, 414 N.E.2d 1051 (1980). By statute, the Commission is “vested with the power and jurisdiction to supervise and regulate **public utilities**....” R.C. 4905.04(A) (emphasis added). By virtue thereof, the Commission has the subject matter jurisdiction to hear complaints brought against

“public utilities,” which include, for example, an “electric light company,” R.C. 4905.03(C), a “water-works company,” R.C. 4905.03(G), and a “sewage disposal system company,” R.C. 4905.03(M), among others.

So long as a respondent in a complaint proceeding is one of the enumerated entities in R.C. 4905.03, the Commission may have subject matter jurisdiction to hear allegations brought against such entity. In the case of a landlord-tenant relationship, however, the statutory public utility definitions are said to be not self-applying. *Pledger v. Pub. Util. Com.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶ 17. Hence the *Shroyer Test*—the Commission’s adopted means of determining whether it has subject matter jurisdiction in a complaint involving landlord-tenant or similar submetering circumstances. *See, e.g., In the Matter of the Commission’s Investigation into Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, ¶ Finding and Order at ¶ 3 (Dec. 7, 2016) (“The Commission has historically applied a three-part test to determine if an entity is operating as a public utility and falls within the scope of the Commission’s exclusive jurisdiction.”); *In the Matter of the Complaint of Pledger v. Capital Properties Mgmt., Ltd.*, Case No. 04-1059-WW-CSS, Entry at ¶ 5 (Oct. 6, 2004) (“In determining whether this Commission has jurisdiction over the instant complaint, the principle test is [*Shroyer*].”).

Yet the Complainant contends that the *Shroyer Test* does not, in fact, serve as a “screening mechanism for determining subject matter jurisdiction,” and that when the Commission has used the word “jurisdiction” when discussing the *Shroyer Test*, the Commission did not mean “subject matter jurisdiction” but instead referred to something else—some undefined power of “regulation.” (Memo. Contra at 4). Complainant’s argument misses the mark. The Commission’s power to *regulate* a given entity directly flows from the threshold

issue of whether it has subject matter jurisdiction over that entity's activities. To that end, the Commission has repeatedly recognized that the *Shroyer Test* is a screening tool for determining its subject matter jurisdiction before proceeding to the merits of a complaint. See, e.g., *In the Matter of the Complaint of Pledger v. Capital Properties Mgmt., Ltd.*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004) (treating affirmative defense of lack of subject matter jurisdiction in respondent's answer as a motion to dismiss, applying *Shroyer*, and dismissing for lack of subject matter jurisdiction); *In the Matter of the Complaint of Toledo Premium Yogurt, Inc. dba Freshens Yogurt v. Toledo Edison Co., et al.*, Case No. 91-1528-EL-CSS, Entry (Sept. 17, 1992) (granting mall companies' motions to dismiss for lack of subject matter jurisdiction and personal jurisdiction on the basis of *Shroyer*); *In the Matter of the Complaint of Michael E. Brooks et al., v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS, Entry (Mar. 16, 1995) (same).

Moreover, Complainant's position is belied by the Supreme Court of Ohio's decision in *Pledger*, which also found that the *Shroyer Test* is a test of the Commission's subject matter jurisdiction.

Based on the complaining tenant's failure to demonstrate that CPM met any part of the *Shroyer* test, the **PUCO determined that it lacked subject-matter jurisdiction** and dismissed the tenant's complaint. **We agree** with the PUCO's determination and hold that the dismissal of the complaint was reasonable and lawful.

Pledger v. Pub. Util. Comm., 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶ 25 (emphasis added). Because the *Shroyer Test* does, in fact, serve as a screening tool for its subject matter jurisdiction over a given complaint, the Commission's decisions make it clear a motion to dismiss is a proper procedural device to apply *Shroyer* and resolve the threshold issue of subject matter jurisdiction.

B. The Commission has repeatedly affirmed that the *Shroyer Test* may be decided on a motion to dismiss for lack of subject matter jurisdiction without the need for a hearing.

Resting on her incorrect assertion that the *Shroyer Test* does not serve as a tool for resolving the question of the Commission's subject matter jurisdiction, Complainant then contends that the Commission simply cannot apply the *Shroyer Test* without first setting her Complaint for a hearing. (Memo. Contra at 6). By mischaracterizing the *Shroyer Test* as unrelated to the Commission's subject matter jurisdiction, the Complainant tries to avoid the Commission's firmly-held recognition that it can address its subject matter jurisdiction by applying the *Shroyer Test* on a motion to dismiss without proceeding to hearing.

By rule, the Commission expressly authorizes respondents in complaint proceedings to proceed through a motion to dismiss to resolve the question of the Commission's subject matter jurisdiction over a given complaint. *See* Ohio Admin. Code 4901-9-01(C)(1) (providing that the respondent to a complaint may assert, by **motion**, the defense of "lack of jurisdiction over the subject matter."). **Based on this authorization, the Commission has repeatedly granted motions to dismiss for lack of subject matter jurisdiction by applying the *Shroyer Test* without first requiring the parties to proceed to hearing.** *See, e.g., In the Matter of the Complaint of Toledo Premium Yogurt, Inc. dba Freshens Yogurt v. Toledo Edison Co., et al.*, Case No. 91-1529-EL-CSS, Entry (Sept. 17, 1992); *In the Matter of the Complaint of Michael E. Brooks et al., v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS, Entry (Mar. 16, 1995); *In the Matter of the Complaint of Nader v. Colony Square Partners, Ltd.*, Case No. 99-475-EL-CSS, Entry (Aug. 26, 1999); *In the Matter of the Complaint of Pledger v. Capital Properties Mgmt., Ltd.*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004). **Moreover, in *Pledger*, the Supreme Court of Ohio affirmed the Commission's decision to dismiss the complaint without a**

hearing on the basis of the landlord's motion to dismiss. *Pledger v. Pub. Util. Com.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶ 17. These decisions all undercut Complainant's contention that the resolution of the *Shroyer Test* requires a hearing.

The Commission's long history of granting motions to dismiss for lack of subject matter jurisdiction under the *Shroyer Test* without first requiring a hearing is also consistent with its Orders in the Submetering Investigation. For instance, at the urging of NEP that the Commission require residents to provide sufficient information that would allow the threshold jurisdiction issue to be addressed *prior to a hearing* on the merits of any submetering complaint, the Commission *agreed to grant rehearing* and established a "safe harbor." Second Entry on Rehearing, *In the Matter of the Commission's Investigation of Submetering in the State of Ohio* at ¶ 40 (June 21, 2017) (the "Second Entry on Rehearing").¹ The safe harbor likewise sets forth specific circumstances when a "reseller" is not subject to the Commission's subject matter jurisdiction under the third prong of the *Shroyer Test*, and was designed to "facilitate an orderly and expedient resolution of any potential complaints." *Id.* at ¶ 40. The safe harbor, like the other components of the *Shroyer Test*, is readily resolvable on a motion to dismiss. Avoiding the time and expense of a hearing where no dispositive evidence is disputed serves the Commission's goal of facilitating the orderly and fast resolutions of submetering-related complaints.

C. The Commission can rule on NEP's motion on the basis of pertinent evidentiary materials.

That the Commission can avoid the time and expense of a protracted hearing by resolving the *Shroyer Test* on a motion to dismiss does not mean, however, that the Commission is

¹ Inexplicably, Complainant contends, in bolded letters, that in the Submetering Investigation, the Commission "specifically rejected NEP's request 'that the threshold jurisdictional issues be determined prior to hearing.'" (Memo. Contra at 4). In fact, the Commission did no such thing. Instead, it granted NEP's sixth assigned error that the threshold jurisdictional issues be resolved prior to hearing and created the "Safe Harbor." *See Id.* at ¶ 39.

deprived of an evidentiary record in this case, as the Complainant suggests. (Memo. Contra at 6). Under a standard of review analogous to Civ.R. 12(B)(1), when reviewing a motion to dismiss for lack of subject matter jurisdiction, “the Commission is not confined to the allegations of the complaint when determining its subject matter jurisdiction; rather it may consider any **pertinent evidentiary materials.**” *In the Matter of the Complaint of Michael E. Brooks et al., v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS, Entry at ¶ 7 (Mar. 16, 1995) (emphasis added) (citing *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211 (1976), paragraph one of the syllabus and *Nemazee v. Mt. Sinai Medical Ctr.*, 56 Ohio St.3d 109, n. 3 (1990)). In this case, NEP supported its Amended Motion to Dismiss with a sworn affidavit and documents demonstrating that NEP is not a jurisdictional public utility under the *Shroyer Test*—evidence that Complainant has not specifically disputed in her Memorandum Contra.

The Commission’s observation in the Second Entry on Rehearing that the *Shroyer Test* must be applied “after the development of an evidentiary record,” Second Entry at ¶ 31, should be understood in the context of the Commission’s authority to consider any pertinent evidence on a motion to dismiss for lack of subject matter jurisdiction. Here, for example, NEP is not asking the Commission to apply the *Shroyer Test* solely based off of the Complainant’s pleadings. Rather, it has put forward probative evidence relating to the elements of the *Shroyer Test*—evidence that Complainant has not attempted to specifically challenge. The Commission can and should apply the *Shroyer Test* to determine on the basis of this evidence, that NEP is not a jurisdictional public utility.

D. The Commission has all the evidence necessary to grant NEP’s Amended Motion.

After the Commission clarified its application of the *Shroyer Test* in June of 2017, NEP moved to dismiss Complainant’s allegations against it. NEP’s Amended Motion is supported by

probative evidence that it is not a jurisdictional public utility under the *Shroyer Test*. By way of example, Complainant asserts that NEP is a “water-works company” under R.C. 4905.03(G), Compl. at ¶¶ 79-83. But the evidence submitted with NEP’s Amended Motion establishes that NEP only provided meter reading, meter repair and billing and payment services to Gateway Lakes Acquisition, LLC in connection with the supply of water by the City of Columbus to Complainant’s former apartment complex; conversely, NEP does not take title to the water coming to the Gateway Lakes apartment complex and does not own any water utility infrastructure. *See* Amended Motion to Dismiss, Exhibit 1, Affidavit of John Calhoun, ¶¶ 15-18. As NEP’s evidence shows, the outcome is the same as to Complainant’s allegations that NEP is a jurisdictional sewage disposal system company.

Moreover, as to Complainant’s allegations regarding her electric service, NEP’s evidence demonstrates, among other things, that one of the Commission’s safe harbors applies to NEP—*i.e.*, that the charges invoiced to Complainant for electric usage at her former apartment did not exceed on an annualized basis what she would have paid the local public utility under the default residential service tariff for equivalent usage. *Id.* at ¶ 23. By qualifying for a safe harbor, NEP is not subject to the Commission’s jurisdiction under the third prong of the *Shroyer Test*. *Id.* at ¶ 23.

Nor is Complainant correct when she asserts that the other allegations against NEP (*e.g.*, that NEP is violating the Certified Territory Act or is operating as a competitive retail electric supplier) do not “require a finding that NEP is a public utility” (Memo. Contra at 5). In fact, they are all contingent on NEP being a jurisdictional public utility. For example, Complainant alleges that NEP is an electric supplier because it allegedly is “supplying or arranging for the supply of retail electric service to Gateway Lakes[.]” (Second Amended Compl. at ¶77). But an

“electric supplier” under the Certified Territory Act is defined as an “electric light company as defined in section 4905.03 of the Revised Code...” R.C. 4933.81(A). Without a threshold finding that a given entity is a public utility “electric light company” under the *Shroyer Test*, an entity cannot be an “electric supplier” under the Certified Territory Act.

Similarly, although Complainant alleges that NEP provided Complainant with competitive retail “generation service” (Second Amended Compl. at ¶ 70), NEP’s non-public utility status means that Complainant is not—and cannot be—a “consumer” of competitive retail electric generation service allegedly provided by NEP. *See FirstEnergy Corp. v. Pub. Util. Com.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485 (finding that the landlord is the consumer and rejecting the notion that tenants of submetered office buildings, apartment complexes, and shopping centers are “ultimate consumers” of electric service under Chapter 4928). Contrary to Complainant’s argument, a finding that NEP is not a jurisdictional public utility disposes of Complainant’s Complaint against NEP.

In sum, besides a **generalized statement** in her Memorandum Contra that “the facts are disputed,” (Memo. Contra at 6), Complainant makes no attempt to actually challenge the veracity of any of the evidence submitted by NEP. And while she complains that she has not had the opportunity to conduct discovery, in fact, Complainant’s action against NEP has been pending since December of 2016, and in the intervening **ten months, Complainant has yet to serve any discovery on NEP**. Moreover, it is not certain what further discovery would yield given the undisputed operative facts in this case. There is no reason to create further delay in this case. The Commission can and should apply the *Shroyer Test* and, based on the evidence submitted with NEP’s Amended Motion to Dismiss, it should dismiss the allegations against NEP.

III. CONCLUSION

NEP's Amended Motion to Dismiss is supported by probative evidence that NEP is not a public utility over which the Commission has subject matter jurisdiction under the *Shroyer Test*. Even though Complainant had over ten months to engage in discovery to develop the facts in this case, Complainant's Memorandum Contra makes no specific challenges to any of the evidence submitted by NEP. Instead, Complainant postures by arguing that the *Shroyer Test* does not function as a screening mechanism for determining the question of the Commission's subject matter jurisdiction, and relatedly, that a motion to dismiss is not the appropriate means for addressing the *Shroyer Test*. Complainant's arguments are misplaced. The Commission and the Supreme Court of Ohio have repeatedly recognized that the *Shroyer Test* is the tool through which the Commission addresses the question of its subject matter jurisdiction over a complaint involving allegations that an entity is acting as a public utility, and that a motion to dismiss is the appropriate means of resolving that question. For the foregoing reasons, the Commission should grant NEP's Motion and dismiss NEP from this case.

Respectfully submitted,

/s/ Michael J. Settineri

Michael J. Settineri (0073369), Counsel of Record

Stephen M. Howard

Gretchen L. Petrucci

Vorys, Sater, Seymour and Pease LLP

52 E. Gay Street

P.O. Box 1008

Columbus, Ohio 43216-1008

614-464-5462

mjsettineri@vorys.com

smhoward@vorys.com

glpetrucci@vorys.com

Attorneys for Nationwide Energy Partners, LLC

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Mark A. Whitt
whitt@whitt-sturtevant.com
Andrew J. Campbell
campbell@whitt-sturtevant.com
Rebekah J. Glover
glover@whitt-sturtevant.com
Steven T. Nourse
stnourse@aep.com
Roger P. Sugarman
rsugarman@keglerbrown.com

Shawn J. Organ
sjorgan@organcole.com
Joshua M. Feasel
jmfeasel@organcole.com
Carrie M. Lymanstall
cmlymanstall@organcole.com
Christen M. Blend
cblend@aep.com

/s/ Gretchen L. Petrucci

Gretchen L. Petrucci

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Case No(s). 16-2401-EL-CSS

Summary: Reply in Support of Amended Motion to Dismiss of Nationwide Energy Partners, LLC electronically filed by Mr. Michael J. Settineri on behalf of Nationwide Energy Partners, LLC