BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

COMPLAINANT'S APPLICATION FOR REHEARING

Cynthia Wingo respectfully requests rehearing of the November 21, 2017 Finding and Order (Order) granting the motion to dismiss of Respondent Nationwide Energy Partners, LLC (NEP). The Order is unreasonable and unlawful because:

1. The Commission offers no facts or reasoning for the dismissal of claims and parties that were not addressed in NEP's motion to dismiss, which violates R.C. 4903.09.
2. The Commission failed to apply the proper standard for review in determining whether "reasonable grounds for complaint" are stated in the Second Amended Complaint (Complaint), which violates R.C. 4905.26.
3. The Commission improperly and prematurely addressed the merits of the Complaint (i) without prior notice that it intended to do so at the pleading stage, (ii) without affording Complainant the opportunity to take discovery, and (iii) without conducting an evidentiary hearing, which violates R.C. 4903.082, 4903.22, and 4905.26.

This application for rehearing is authorized under R.C. 4903.10, and should be granted for the reasons explained in the incorporated memorandum in support.

MEMORANDUM IN SUPPORT

Cynthia Ms. Wingo's 11-Count Complaint includes several claims alleging that NEP is a "public utility" under R.C. 4905.02 and 4905.03. NEP filed a motion to dismiss, arguing the Commission lacks subject matter jurisdiction over these claims. The Order dismisses not only the claims that NEP is a public utility, but *all* claims. The Order dismisses the Complaint not only as to NEP, but as to *all* respondents—including the respondent who has inexplicably failed to appear or answer. The Order dismisses *all* claims against *all* respondents not because of a "lack of jurisdiction," but based on the Commission's *sua sponte* merits determination that "the resale of utility service to Ms. Wingo's apartment . . . falls within the safe harbor provisions of the *Shroyer Test*." Order ¶ 26.

The Commission has plainly confused the "burden" to allege "reasonable grounds for complaint" with the burden a complainant must satisfy to prevail at hearing. There is no question that the Order is flawed. There is no question that if rehearing is denied, the Order will be reversed on appeal. The only question is how many different grounds the Supreme Court will cite in reversing the Order. This application for rehearing does not attempt to catalogue all of these grounds; just the most obvious.

First, the Order is utterly silent on the fact that Counts II, III, VI, IX, X, and several statutory violations alleged in Count XI, do not require a finding that NEP is a public utility. The Commission must reinstate the Complaint as to these counts. No respondent has requested that these Counts be dismissed, and the Order offers no rationale whatsoever for their dismissal.

Second, in considering the motion to "dismiss," the Commission considered materials outside the pleadings, resolved factual disputes in favor of NEP, and decided *on the merits* that the Safe Harbor applies to the resale of utility services to Ms. Wingo. This was done with no

opportunity for discovery, no evidentiary hearing, and no notice that the Commission intended to treat NEP's motion as a motion for summary judgment. The Commission has no authority to grant summary judgment in the first instance, and its attempt to do so here does not remotely comply with Civil Rules 12 and 56.

Third, in prematurely deciding this case on the merits, the Commission applied the *Shroyer Test*. That test is flawed and should not have been applied. Applying it in a manner flatly inconsistent with the December 7, 2016 and June 21, 2017 orders (COI Orders) only compounds the Commission's error.

The Commission should grant rehearing, vacate the Order, and give Ms. Wingo the opportunity to meet her burden of proof at an evidentiary hearing.

I. ARGUMENT

R.C. 4905.26 requires the Commission to hear a complaint "if it appears that reasonable grounds for complaint are stated." R.C. 4905.26; Order ¶ 22. "[I]f the complaint is to meet the 'reasonable grounds' test, it must contain allegations, which, if true, would support the finding that the rates, practices, or services complained of are unreasonable or unlawful." Order ¶ 23 (quoting *Consumers' Counsel v. Dayton Power & Light Co.*, Case No. 88-1085-EL-CSS, Entry (Sept. 27, 1988).). "[A]ll 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 ¶ 7 (July 1, 2009). It is reversible error to dismiss a complaint where reasonable grounds have been alleged. *Allnet Comm. Servs., Inc. v. Public Util. Comm'n*, 32 Ohio St. 3d 115, 118 (1987) ("Inasmuch as Allnet complied with the statutory requirement of "reasonable grounds" for complaint, R.C. 4905.26 required that the PUCO set a hearing and publish notice of the matters raised in the complaint. We find that

PUCO's dismissal of Allnet's complaint without such notice and a hearing was unreasonable and unlawful.") *W. Reserve Transit Auth. v. Public Util. Comm'n,* 39 Ohio St. 2d 16, 19 (1974) (reversing Commission order where "[t]he above-quoted procedural requirements in R.C. 4905.26 are clear, but were not observed by the commission in this case.").

Ms. Wingo's Second Amended Complaint alleges facts that, if true, support a finding that the Respondents committed the 11 specific violations alleged in the Complaint. The truth of these allegations is *presumed*. Ms. Wingo bore no "burden of proof" at the pleadings stage. Her Complaint states "reasonable grounds" for each violation alleged, as required by R.C. 4905.26.

A. The Order contains no facts or reasoning for the dismissal of non-moving respondents, or the dismissal of claims that were not addressed in the moving party's motion.

Counts I, IV, and V of the Complaint allege that Respondents, individually or collectively, are electric light companies, water companies, and sewage disposal companies, each of which is a "public utility." Counts VII and VIII allege violations of Commission rules for minimum service requirements, as well as standards for the establishment and termination of service, applicable to public utilities. Count XI is comprised of a list of statutory violations, some of which apply to public utilities, and others which do not. A ruling in Ms. Wingo's favor on any of these Counts would also potentially trigger liability under Count X (unlawful abandonment of service) for entities *other than* NEP.

The Order finds that "the resale of utility service to Ms. Wingo's apartment . . . falls within the safe harbor provisions of the *Shroyer Test*." Order ¶ 26. The Shroyer Test is only relevant to claims that an entity is a public utility. *See* Dec. 7 COI Order ¶ 16. Five of the 11 counts of the Complaint do *not* require Ms. Wingo to prove that one or more respondents is a "public utility." Count II (unlawful provision of *competitive* retail electric service), Count III (violation of Certified Territory Act, which applies to "electric suppliers," not "public utilities"),

Count VI (violation of minimum service requirements for *competitive* electric services), Count IX (unfair, misleading, deceptive, and unconscionable practices under rules applicable to *competitive* electric suppliers), and several paragraphs in the list of violations in Count XI, allege claims that are independent of any entity's status as a public utility. The Commission committed reversible error by dismissing these claims for no reason. See *MCI Telecommunications Corp. v. Public Util. Comm'n,* 32 Ohio St.3d 306, 312 (1987) ("PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded.").

B. The Commission unreasonably, unlawfully, and without prior notice converted NEP's motion to dismiss into a motion for summary judgment, ignoring the "reasonable grounds" test applicable under R.C. 4905.26.

The Commission cited the proper standard of review for a motion to dismiss, but failed to apply it. The "reasonable grounds" requirement is satisfied if a complaint "contain[s] allegations, which, if true, would support the finding that the rates, practices, or services complained of are unreasonable or unlawful." Order ¶ 23. Ms. Wingo's allegations, if true, support a finding that NEP is a public utility under each of the three prongs of the Shroyer Test. Her complaint meets the "reasonable grounds" test.

The Complaint alleges that the Respondents, including NEP, are "resellers" as defined in the COI Orders. Complaint ¶ 7. Paragraphs 9 through 63 of the Complaint lay out in detail the respondents' interactions with each other as well as with Ms. Wingo. Paragraphs 64 through 120 connect these facts to the applicable law to state 11 separate causes of actions. The Complaint alleges that NEP has "manifested an intent to be a public utility by availing itself of the benefits of public utilities" that "NEP makes it services available to the general public," and that "the provision of utility services by NEP is not ancillary to its primary business." *Id.* ¶¶ 49-51. The Complaint denies that Ms. Wingo paid the same rates to NEP that she would have paid to AEP.

Id. ¶¶ 22, 26, 31, 52. Every element of every cause of action apparent from the face of the Complaint.

The Order simply ignores the *Complaint* and focuses instead on NEP's motion. The Order concludes that reasonable grounds for complaint are not stated because "the resale of utility service . . . falls within the safe harbor provisions of the *Shroyer Test*." Order ¶ 26. This finding is not based on any allegation, or lack thereof, in the Complaint. It is based solely on "evidence" submitted by NEP. The Commission patently disregarded the allegations in the Complaint, accepted NEP's motion at face value, and construed all inferences against Ms. Wingo instead of for her.

The Order does not, and cannot, distinguish the way it treated NEP's motion from a summary judgment motion. "[S]ummary judgment is generally granted by courts when it appears that there are no genuine issues as to material facts." *First Toledo Corp. v. Toledo Edison Co*., 02-2665-EL-CSS, Entry ¶ 10 (June 11, 2003) (*citing* Ohio Civil Rule 56(C).) The Order cites the alleged absence of disputed facts as the basis for the decision—and even forecloses the possibility that any facts developed during discovery or presented at hearing would change the Commission's mind. Order ¶ 26. The Commission has previously acknowledged that where, as here, the allegations in a complaint are denied, the facts are fairly considered to be "disputed" and dismissal is inappropriate. *First Toledo Corp*. at ¶ 10. The Order makes no attempt to distinguish its reasoning in *First Toledo* from the reasoning applied here. This alone is reversible error. *Ohio Consumers' Counsel v. Pub. Util. Comm*., 2006-Ohio-5789, ¶ 34, 111 Ohio St. 3d 300, 309 ("[T]he commission may modify orders as long as it justifies those changes.")

Moreover, even if the Commission could entertain summary judgment motions, it cannot convert a motion to dismiss into a motion for summary judgment without notice—which is

exactly what it did here. "Failure to notify the parties that the court is converting a Civ.R. 12(B)(6) motion to dismiss into one for summary judgment is, itself, reversible error. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 96 (1995).

It is flat wrong to say that Ms. Wingo "does not dispute that during her tenancy, NEP's invoiced charges were less than what [she] would have paid for the period and usage under the default service tariff on an annualized basis." Order ¶ 26. For starters, Ms. Wingo was not given an opportunity to dispute this "fact." She had no opportunity for discovery, and notice was not given that the Commission intended to convert the motion to dismiss into a motion for summary judgment. More fundamentally, Ms. Wingo has no obligation to dispute *anything* at the pleading stage. That is what discovery and hearing are for. Ms. Wingo's only obligation was to present allegations establishing reasonable grounds for complaint—which she did.

The Order also gets it wrong by finding that Ms. Wingo did in "fact" pay less to NEP that she would have paid to the host utility. Order ¶ 26. The Relative Price Test must include not only metered usage, but also "administrative fees or similar charges." June 21 Order ¶ 49. The account information submitted with Ms. Wingo's original complaint show that she paid *thousands* of dollars in late fees and penalties---"administrative fees or similar charges" that she would *not* have paid to AEP. *See* Complaint, Exs. A and B. NEP conveniently ignored these charges in its calculation, presenting what is not only an apples-to-oranges comparison, but a comparison that proves Ms. Wingo paid far more to NEP that she would have paid to AEP.

Whether Ms. Wingo paid more or less to NEP is really not the point—at least at the pleading stage. She has *alleged* she paid more, and that allegation is entitled to a presumption of truth. Even if she had not alleged she paid more, she has still pled allegations that, if true, support a finding that NEP has violated the law. The Commission jumped the gun by addressing this

factual dispute prematurely.

C. The Commission unreasonably and unlawfully deprived Ms. Wingo of any opportunity for discovery.

In opposing NEP's motion, Ms. Wingo specifically called attention to her right to discovery under R.C. 4905.082, as well as the provision of Rule 56 that precludes ruling on summary judgment motions when the responding party has not had an opportunity to take discovery. Mem. Contra at 7. The Commission disregarded these rights.

The Order brushes off the denial of discovery by claiming Ms. Wingo "does not identify any facts that, if proven at hearing, would change the outcome of our analyses under the safe harbor provisions of the *Shroyer Test* as set forth in the COI Entry on Rehearing." Order ¶ 26. The Order misses the point. The inability to even *commence* discovery deprived Ms. Wingo of any opportunity to "identify any facts" in the possession of NEP, other Respondents, or the host utilities from whom NEP purchased and resold utility services. The only information made available to Ms. Wingo was the information NEP submitted with its motion to dismiss. She had no opportunity whatsoever to serve written discovery, take depositions, or otherwise explore the *undisclosed* data and information underlying NEP's "study."[1] Ms. Wingo cannot identify facts that were not disclosed to her.

The fact that Ms. Wingo did not immediately service discovery does not show a lack of diligence. A motion to lift the stay in the Whitt Complaint Case was filed about a week before the filing of Ms. Wingo's original complaint. *See* Case No. 15-697-EL-CSS, Motion (Dec. 12, 2016). That motion was ignored. And there can be little doubt that if Ms. Wingo had served

[1] To this day, the underlying facts and data considered or relied on by NEP in its "comparison study" remains a mystery. NEP *literally* just says, in the most conclusory fashion possible, "[NEP's] invoiced charges were $11.78 less than the AEP Ohio default charges for the same period and usage." NEP Mem. Supp., Ex. 1 ¶ 23. How do we know this? Because NEP says so.

discovery while the first rehearing order was still pending, NEP would have asked for a stay, and the Commission would have granted it. When the Commission finally issued the Second Entry in June 2017, it included material changes to the "Relative Price Test" and "Safe Harbor." Ms. Wingo then *promptly* sought leave to file an amended pleading, which was promptly met with a motion to dismiss. Her memorandum contra pointed out that she had not had an opportunity to take discovery, but to no avail.

To deny any ability to take discovery, and then dismiss a complaint for failing to rebut information solely under the control of the adverse party, is to deny any semblance of due process or fair play. R.C. 4903.083 requires the Commission to afford ample rights of discovery, and that did not happen.

D. The Commission's reliance on, and application of, the COI Orders was unreasonable and unlawful.

The flaws in the *Shroyer Test* have been and are being addressed on rehearing in the COI, and need not be addressed again here. But for the record, Ms. Wingo is not bound by any order—past, present, or future—issued in the COI. Ms. Wingo was not a party to the COI, received no notice of the proceeding, and along with the rest of the consuming public, had no opportunity to speak at a public hearing. Thus, the Commission is mistaken to claim that the COI orders "put the Complainant on notice" that her rights would be affected by the COI Orders. Order ¶ 25.

In the off chance that the COI Orders ultimately withstand appeal, the "regulatory framework" discussed in those orders is not the framework that was applied to Ms. Wingo's Complaint. The Order drastically departs from the COI orders in two important respects.

First, the Order construes the Safe Harbor as a defense to all three factors under the *Shroyer Test*, rather than just the third factor. The COI Orders clearly and repeatedly limit the

Safe Harbor (along with the "rebuttable presumption" and "relative price test") to the third factor. Dec. 7 Order ¶¶ 16, 17; June 21 Order ¶ 4, 34, 40, 50. The COI Orders also *repeatedly* emphasize that an affirmative answer to *any* of the three *Shroyer Test* factors is sufficient to establish that an entity is a public utility. *See, e.g.,* Dec. 7 Order ¶¶ 20; June 21 Order ¶ 4, 32. Thus, even if the Safe Harbor barred a claim under the third factor, it does not and cannot bar claims under the first and second factors.

Second, the Order also misapplies the "rebuttable presumption," and turns the very idea of a "presumption" on its head. According to the COI Orders, "*a submetered residential customer* can trigger the rebuttable presumption through use of the Relative Price Test." June 21 Order ¶ 50 (emphasis added). "If the submetered customer is paying the Reseller more than what he/she would have paid the local public utility, then then rebuttable presumption is triggered, and the Reseller is presumed to be a public utility under the third prong of the *Shroyer Test*." *Id.* The Reseller, however, could avoid jurisdiction "if it can prove that it falls within one of the Safe Harbor provisions" described in the Order. *Id*.

The Commission has previously acknowledged that the rebuttable presumption is an *evidentiary rule* that "imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but *does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.*" *Id*. quoting Evid. R. 301 (emphasis in original). The presumption described in the COI orders may be invoked *by* a submetered customer *against* a reseller. The reseller may rebut the presumption by showing that it "passes" the Relative Price Test. The Commission treated NEP's motion *as if the Safe Harbor itself was a presumption* that a reseller could invoke *against* a consumer, and then proceeded to treat this "presumption" as a

prima facie defense that shifted the burden to Ms. Wingo to prove that she paid more to NEP that she would have paid to a regulated utility. This is not how *any* presumption works, let alone the presumption described in the COI orders. The Order engages is *exactly* the type of burden-shifting that the Commission denied it would exercise. *Id*. ¶ 39 ("[T]he December 7, 2016 Order did not change the complainant's burden of proof in complaint cases.").

Even if Ms. Wingo had conceded that she paid NEP less than what she would have paid NEP, the only consequence would be that the rebuttable presumption would not be triggered under the third prong. *See id*. at ¶ 50. ("*If* the submetered customer is paying the Reseller more . . . *then* the rebuttable presumption would be triggered.")(Emphasis added.) If the rebuttable presumption is *not* triggered, then the reseller is *not* "presumed to be a public utility under the third prong of the Shroyer Test." *Id*. And if the reseller is *not* presumed to be a utility, there is absolutely no reason consider the Relative Price Test or Safe Harbor. Again, the purpose of the Safe Harbor (supposedly) is to rebut a presumption. If the presumption is not invoked, there is nothing to rebut.

If the "rebuttable presumption" is never triggered in the first instance, then the relevant inquiry under the third prong of Shroyer is whether the resale or redistribution of utility service is the reseller's primary business. "If the resale or redistribution of public utility service is the landlord's or other entity's primary business, then we will recognize the landlord or other entity as a public utility, subject to the Commission's exclusive jurisdiction to regulate public utilities and the certified territory provisions of R.C. 4933.83." *Id*. at ¶ 20. The Complaint not only alleges that NEP's business primarily involves reselling; NEP all buts admits to this in its motion to dismiss.

II. CONCLUSION

For the reasons stated herein, the Commission should grant this application for rehearing.

Dated: December 21, 2017

Respectfully submitted,

s/ Mark A. Whitt

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

Summary: Application for Rehearing electronically filed by Ms. Rebekah J. Glover on behalf of Ms. Cynthia Wingo