

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

FOURTH ENTRY ON REHEARING

Entered in the Journal on January 9, 2019

I. SUMMARY

{¶ 1} The Commission denies the applications for rehearing of the June 21, 2017 Second Entry on Rehearing.

II. PROCEDURAL HISTORY

{¶ 2} On December 16, 2015, the Commission issued an entry initiating this proceeding to consider the views of all stakeholders regarding the proper regulatory framework to be applied to submetering practices with respect to condominium associations in the state of Ohio. The Commission's three-part test, now known as the *Shroyer* Test, for determining whether a mobile home park owner that was reselling submetered municipal water service was acting as a public utility and was, therefore, subject to this Commission's jurisdiction, was established in *In re Inscho, et al. v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) at 2, 4-6:

- (1) Has the landlord manifested an intent to be a public utility by availing itself of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right-of-way for utility purposes?
- (2) Is the utility service available to the general public rather than just to tenants?
- (3) Is the provision of utility service ancillary to the landlord's primary business?

{¶ 3} The Commission's use of the *Shroyer* Test was affirmed as reasonable by the Supreme Court of Ohio in *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, at ¶18. In addition to waterworks companies, the *Shroyer* Test has been applied to the provision of electric utility service. See, *In re Pledger v. Capital Properties Management, LTD*, Case No. 04-1059-WW-CSS, Entry (Oct. 6, 2004); *In re Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987-EL-ATA, Opinion and Order (May 8, 1996); *In re FirstEnergy Corp.*, Case No. 99-1212-EL-ETP, et al., Entry (Nov. 21, 2000); *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485 (*FirstEnergy ETP*) at ¶10, 18.

{¶ 4} On December 7, 2016, the Commission issued a Finding and Order (Dec. 7, 2016 Order) in this proceeding which, after reviewing the comments of the stakeholders, expanded the application of the *Shroyer* Test, on a case-by-case basis, to condominium associations, submetering companies, and other similarly situated entities engaged in the resale or redistribution of public utility services (collectively, Resellers). The Dec. 7, 2016 Order also clarified that an affirmative answer to any one of the three prongs of the *Shroyer* Test may be sufficient to demonstrate that an entity is operating as a public utility subject to the Commission's jurisdiction. In addition, the Dec. 7, 2016 Order adopted a Relative Price Test under which a Reseller's total bill charges would be compared to the charges for a similarly-situated customer served under the local public utility's tariff, including standard service offer generation rates for electric service. If the Reseller's total charges exceeded the costs of comparable service from the local public utility beyond the specified threshold percentage, the Relative Price Test would trigger a rebuttable presumption that the provision of the utility service is not ancillary to the Reseller's primary business. Consequently, the Reseller would be deemed to be providing public utility service subject to the Commission's jurisdiction under the *Shroyer* Test. Dec. 7, 2016 Order at ¶¶16-18.

{¶ 5} Applications for rehearing of the Dec. 7, 2016 Order, as well as comments regarding a reasonable threshold percentage for the Relative Price Test, were filed by the

various stakeholders, and the Commission granted time for further consideration in our first Entry on Rehearing issued on February 1, 2017.

{¶ 6} On June 21, 2017, the Commission issued the Second Entry on Rehearing in this docket (Jun. 21, 2017 Entry), which reviewed the applications for rehearing and further stakeholder comments before adopting a zero percentage threshold for the Relative Price Test, and clarifying that such test would only apply to submetered residential customers. The Jun. 21, 2017 Entry affirmed the use of the rebuttable presumption and Relative Price Test where a Reseller of utility service would be presumed to be acting as a public utility under the third prong of the *Shroyer* Test if the Reseller charged a submetered residential customer more than what the customer would have paid if directly served under the local public utility's default service. However, the Jun. 21, 2017 Entry also created two Safe Harbor exceptions under which the Reseller could overcome this rebuttable presumption and avoid Commission jurisdiction: (1) where the Reseller is only passing through its annual costs of providing the utility service, or (2) where the Reseller's annual charges for the utility service do not exceed what the customer would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs. Jun. 21, 2017 Entry at ¶40.

{¶ 7} On July 21, 2017, applications for rehearing of the Jun. 21, 2017 Entry were filed by the Ohio Partners for Affordable Energy (OPAE); by American Power and Light, LLC (AP&L); by Ohio Power Company (AEP Ohio) jointly with Duke Energy Ohio, Inc. (AEP & Duke); by the FirstEnergy operating companies, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (FirstEnergy); by Mark A. Whitt; and jointly by the Ohio Consumers' Counsel with the Ohio Poverty Law Center (OCC/OPLC).

{¶ 8} On July 21, 2017, Direct Energy Services, LLC and Direct Energy Business, LLC (Direct Energy), as well as the Building Owners and Managers Associations of Greater Cleveland and Ohio (BOMA), filed memoranda contra to the AEP & Duke application for

rehearing, while the Industrial Energy Users-Ohio (IEU-Ohio) filed a memorandum opposing the AEP & Duke, OP&E, and FirstEnergy applications for rehearing, and OCC filed a memorandum contra to AP&L's application for rehearing.

{¶ 9} On August 16, 2017, the Commission issued its Third Entry on Rehearing granting additional time for consideration of the issues raised by the July 21, 2017 applications for rehearing.

{¶ 10} On September 25, 2017, State Representative Mike Duffy filed correspondence from Mr. Duffy to Chairman Haque, dated September 4, 2017, regarding the application of R.C. 111.15 to the Jun. 21, 2017 Entry.

### III. ARGUMENTS FOR REHEARING

{¶ 11} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 12} With respect to each application for rehearing, we first note that any failure to expressly address every point raised does not mean it was not considered by the Commission in reaching its conclusions below, and that any assignments of error not specifically addressed by the Commission are hereby denied.

#### A. *Promulgation of Rules*

{¶ 13} In his application for rehearing, Mr. Whitt contends that the Jun. 21, 2017 Entry is unreasonable and unlawful because the Commission has promulgated rules, as defined by R.C. 111.15(A)(1), without filing such rules for approval with JCARR, the Secretary of State, and the Legislative Service Commission. He points to ¶14 of the Jun. 21, 2017 Entry in arguing that the Commission's stay of the proceedings of his own complaint in Case No. 15-697-EL-CSS was unreasonable and unlawful because it was granted for the express

purpose of creating new legal standards to apply to the claims alleged in his complaint.<sup>1</sup> Moreover, he claims that the precise problem is that the *Shroyer* Test has never been incorporated within the Commission's rules.

{¶ 14} This argument was considered and rejected in the Jun. 21, 2017 Entry at ¶¶ 25-26. In restating his arguments, Mr. Whitt ignores the Supreme Court's holding in *Pledger*, 109 Ohio St.3d 463, 466; 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 17-25, which expressly upheld this Commission's use of the *Shroyer* Test in determining our jurisdiction under R.C. 4905.02 and 4905.03 on a case-by-case basis, in response to complaints or requests brought before us. *See also, FirstEnergy ETP*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, upholding the Commission's decision to reaffirm in *Brooks*, Case No. 94-1987-EL-CSS, (May 8, 1996), which followed *Shopping Centers Assn. v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 32 O.O.2d 1, 208 N.E.2d 923 (1965).

{¶ 15} The Commission has statutory authority to address matters pursuant to its own "initiative or complaint" pursuant to R.C. 4905.26. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360 at 364-365, 2007-Ohio-53, 859 N.E.2d 957. Pursuant to this authority we opened the Commission-ordered investigation into our jurisdiction over submetering entities as public utilities. In *Discount Cellular*, the Ohio Supreme Court upheld the Commission's exercise of "its authority under R.C. 4927.03(A)(1) to deregulate any public telecommunications service except basic local exchange service 'by order' when it issued the [Finding and Order in re the Commission Investigation into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers, Case No. 9[7]-1700-TP-COI (Dec. 16, 1999), referred to by the Court as the 1700 Order]. R.C. 111.15 and R.C Chapter 119 were not applicable to the 1700 proceedings. Similarly, there was no requirement that the 1700 Order be codified by the Ohio Administrative Code, because the PUCO was not engaged in rulemaking when it issued the 1700 Order." *Id.* at 366.

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<sup>1</sup> Mr. Whitt's complaint against NEP in Case No. 15-697-EL-CSS was voluntarily dismissed without prejudice at his request on October 20, 2017.

{¶ 16} This Commission has authority to initiate a case to review matters involving “any rate, \*\*\*, or service, or any joint rate, \*\*\*, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, \*\*\*.” R.C. 4905.26.

{¶ 17} In addition, similar to the statute at issue in *Discount Cellular*, the Commission has authority pursuant to R.C. 4905.37, in a Commission-ordered investigation conducted under R.C. 4905.26, to prescribe, “by order” the regulations, practices, and service to be installed, observed, used, and rendered by any public utility. The Commission would additionally note that R.C. 4905.06 provides that the Commission’s “power to inspect includes the power to prescribe any rule or **order** that the commission finds necessary for protection of the public safety.” [Emphasis added]. Therefore, the legislature has provided the Commission adequate authority to address its jurisdiction over submetering entities through a Commission-ordered investigation.

{¶ 18} It is also true that this Commission has broad discretionary authority to make rules in its supervision of public utilities under R.C. 4905.05, 4905.06, and 4928.06. The Commission has exercised that discretion to enact minimum electric service standards, minimum gas service standards, and minimum water standards. Ohio Adm.Code Chapters 4901:1-10, 4901:1-13, and 4901:1-15. However, before the Commission can apply these rules to any particular entity, we must determine if the entity is a public utility operating under our jurisdiction. For this reason, the Commission originally promulgated the *Shroyer* Test, not by rule, but based upon the specific complaint and the facts and circumstances in that particular case. “The decision whether to proceed by rule making or adjudication to resolve a dispute lies primarily in the informed discretion of the administrative agency.” *Hamilton*

*County Bd. of Mental Retardation and Developmental Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 151, 545 N.E.2d 1260 (1989) citing *Duff Truck Line, Inc. v. Pub. Util. Comm.*, 46 Ohio St.2d 186, 348 N.E.2d 127, 75 O.O.2d 229 (1976).

{¶ 19} Moreover, we note that in the quarter century since the *Shroyer* Test was first adopted, neither the Supreme Court of Ohio nor the General Assembly have required the Commission to engage in any administrative rulemaking with respect to our jurisdiction over submetering entities arrangements. In fact, the Court has affirmed the *Shroyer* Test as reasonable and lawful. *Pledger*, 109 Ohio St.3d 463, 466; 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 17-25. See also, *Discount Cellular*, 112 Ohio St.3d 360 at 364-365, 2007-Ohio-53, 859 N.E.2d 957.

{¶ 20} Mr. Whitt argues that under R.C. 111.15(A)(1), a “rule” includes a “standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency \*\*\*.” He asserts that the express purpose of the Jun. 21, 2017 Entry was to establish standards that the Commission will apply to Resellers on a case-by-case basis, and he notes that the Jun. 21, 2017 Entry at ¶¶ 1, 11, 28, and 50 specifically discusses the contexts in which the Commission will not apply such standards. He cites *Ohio Assn. of Cty. Bds. of Mental Retardation & Developmental Disabilities v. Pub. Emp. Ret. Sys.*, 61 Ohio Misc. 2d 836, 839, 585 N.E.2d 597, 599 (Com. Pl. 1990), for the proposition that an administrative rule, having the force and operation of a statute which extinguishes or impairs a vested legal relationship, creates a new obligation, imposes a new duty, or attaches a new disability to previous transactions, constitutes a retroactive enactment and results in a deprivation of property without due process of law.

{¶ 21} The Jun. 21, 2017 Entry, however, does none of those things. Rather, we initiated this proceeding based on our general supervisory authority over public utilities under R.C. 4905.06, in response to both formal and informal complaints under R.C. 4905.26, that submetering entities were providing services that rendered them public utilities subject to our regulatory jurisdiction. Jun. 21, 2017 Entry at ¶¶ 14, 24.

{¶ 22} The modified *Shroyer* Test is not the result of the exercise of our rule-making authority, but was developed on a case-by-case basis, through Commission decisions determining the extent of our jurisdiction under R.C. 4905.06 and 4905.26, as affirmed by the Supreme Court of Ohio. Moreover, the Commission has no mandatory burden of promulgating regulations in the absence of a specific legislative mandate. *Cleveland Freight Lines, Inc. v. Pub. Util. Comm.*, 62 Ohio St.2d 50, 402 N.E.2d 1192, 16 O.O.3d 38 (1980). Additionally, the Commission has stated and now affirms here that the *Shroyer* Test will be applied on a case-by-case basis considering the facts of each specific case. Dec. 7, 2016 Order at ¶ 17. *In re Wingo v. Nationwide Energy Partners, LLC, et al.* Case No 17-2002-EL-CSS, Finding and Order, Oct. 24, 2018, ¶ 70-75, where the Commission affirmed the use of the *Shroyer* Test in a submetering complaint, we had to apply the test based on the facts presented in the case, as only five months of bills were submitted and a full year's bill comparison was not available. The application of the *Shroyer* Test has continued, and will continue, to evolve over time, based on the unique facts and circumstances of each case before the Commission. Flexibility "poses no legal problem – an agency, particularly when facing new issues, may proceed on an incremental, case-by-case basis." *In re Application of Buckeye Wind, L.L.C.*, 2012-Ohio-878, ¶ 33, 131 Ohio St.3d 449, 457-58, 966 N.E.2d 869, 877. An "agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule," and thus, "the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective." *Id.* (citing *Securities & Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 202-203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947)). Therefore, we conclude that the *Shroyer* Test is not appropriate for a rulemaking.

{¶ 23} Consequently, we find that the Jun. 21, 2017 Entry's establishment of the Relative Price Test and Safe Harbor provisions constitutes a reasonable basis for determining the Commission's **jurisdiction** over residential submetered services on a case-by-case basis. Further, we conclude that this Commission was not required to promulgate



a rule in order to modify the *Shroyer* Test or adopt the Relative Price Test and Safe Harbor exceptions. Therefore, rehearing on this basis will be denied.

**B. No Advisory Opinion**

{¶ 24} In his second ground for rehearing, Mr. Whitt asserts that the Jun. 21, 2017 Entry is unreasonable and unlawful because it constitutes an advisory opinion. He reasons that if the Jun. 21, 2017 Entry is not a rule, then the only other possible characterization is that it must be an advisory opinion that states the Commission's opinion of what the law would be based upon a hypothetical state of facts. *Bilyeu v. Motorists Mutual Ins. Co.* 36 Ohio St.2d 35, 37, 303 N.E.2d 87, 165 O.O.2d 179 (1973). He also cites *City of Cleveland v. Public Util. Comm'n*, 64 Ohio St.2d 209, 217, 414 N.E.2d 718, 18 O.O.3d 418 (1980), in contending that if the modified *Shroyer* Test will not have a general and uniform application such that it falls within the statutory definition of a rule under R.C. 111.15(A)(1), then it simply represents how the Commission might decide future cases and becomes an advisory opinion which the Commission has no authority to issue.

{¶ 25} Mr. Whitt's second assignment of error was considered and rejected in the Jun. 21, 2017 Entry at ¶¶12-14, and we find neither of the above-cited cases to be controlling here. In *Bilyeu*, the Supreme Court found that the trial court had not abused its discretion in refusing to grant declaratory judgment where the controversy was contingent. In *City of Cleveland*, the Court held that this Commission properly denied OCC's request for a hearing pursuant to R.C. 4925.06 where there was no current dispute, but merely an allegation that at some time in the future a dispute will occur. *City of Cleveland*, 64 Ohio St.2d 209, 216-217.

{¶ 26} Mr. Whitt is incorrect in contending that the Jun. 21, 2017 Entry must either fall under the statutory definition of an administrative rule or constitute an advisory opinion. The Jun. 21, 2017 Entry in this proceeding merely sets forth, at ¶¶ 1, 11, 28, and 50, the legal analysis that the Commission will use to determine its jurisdiction over Resellers on a case-by-case basis. It is not uncommon for the Commission or the Court to create a test for jurisdiction. See, e.g., *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301,

2008-Ohio-3917, at ¶¶11-14. Such tests are neither “rules” nor advisory opinions. The Jun. 21, 2017 Entry does not consider any evidence or apply the Safe Harbor exceptions to specific factual circumstances. Jun. 21, 2017 Entry at ¶¶14, 24. Accordingly, rehearing on this ground will be denied, as will Mr. Whitt’s application for rehearing.

**C. Safe Harbor Provisions**

{¶ 27} As their first assignment of error, AEP & Duke contend that the Safe Harbor provisions established in the Jun. 21, 2017 Entry are unlawful and unreasonable, and should be eliminated, modified, or at least clarified on rehearing. They list three arguments under this single ground for rehearing: (1) that the Safe Harbors conflict with the established case-by-case precedent; (2) that the Safe Harbor protections can be nullified through the use of an affiliated supplier; and (3) that, at a minimum, the Commission should clarify that the Safe Harbors only apply to the third prong of the *Shroyer* Test. In addition, AEP & Duke contend that the Commission’s statutory authority does not support treating residential submetered arrangements differently from those involving commercial or industrial customers.

**1. THE SAFE HARBORS WILL BE APPLIED ON A CASE-BY-CASE BASIS**

{¶ 28} With respect to their first argument of their first assignment of error, AEP & Duke assert that our adoption of the Safe Harbor provisions will conflict with the case-by-case approach required under long established precedent in *Indus. Gas Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 413, 14 O.O. 290, 21 N.E.2d 166, syllabus ¶1 (1939), *Montville Bd. of Twp. Trustees v. WDBN, Inc.*, 10 Ohio App.3d 284, 10 OBR 400, 461 N.E.2d 1345 (1983), and *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 1992-Ohio-23, 596 N.E.2d 423. They reason that if the result is a true Safe Harbor, the determination of a Reseller’s status as a public utility is no longer on a case-by-case basis. Conversely, they contend, if a true case-by-case approach is applied, the Safe Harbors will have no real value or purpose. Further, AEP & Duke assert, if a Reseller is found to be operating as a public utility with respect to some customers, it is a public utility for all purposes.

{¶ 29} Similarly, FirstEnergy argues in its second assignment of error that if the Safe Harbor provisions are applied on a case-by-case basis it will produce absurd results, such that, a Reseller could be declared a public utility as to only a single residential submetered customer at a specific premise. FirstEnergy requests that the Commission clarify that if a Reseller is found to be operating as a public utility in a complaint proceeding brought by a single residential submetered customer, the Reseller must also be operating as a public utility with respect to all other residential submetered customers at the same premise.

{¶ 30} While IEU-Ohio remains opposed to the Relative Price Test, they dispute FirstEnergy's assertion that further clarification is needed as the Commission already requires an entity to bring its practices into compliance with Commission regulations if the entity is determined to be a public utility in a complaint case. *See, e.g., Meek v. Gem Boat Service, Inc.*, Case No. 85-1891-WS-CSS, Opinion and Order (Mar. 3, 1987) and Entry on Rehearing (Apr. 21, 1987), 1987 WL 1466928.

{¶ 31} As described in the Jun. 21, 2017 Entry at ¶¶40, 49-50, the Relative Price Test and Safe Harbor provisions are modifications to the *Shroyer* Test, which was affirmed by the Court in *Pledger*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14 at ¶¶17-25, and *FirstEnergy ETP*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, for determining the Commission's jurisdiction under R.C. 4905.02 and 4905.03, on a case-by-case basis. These modifications to the *Shroyer* Test do not eliminate the need for a case-by-case analysis, which would include such facts and circumstances as a Reseller's treatment of similarly-situated residential customers at the same premises, a Reseller's use of an affiliated supplier, or a Reseller's manipulation of charges for common areas or other services, as will be further discussed below. Such case-by-case analysis should ferret out any attempts at subterfuge in applying the Relative Price Test and Safe Harbor analysis to a particular residential submetered arrangement. We believe the Safe Harbors will provide valuable guidance to parties in considering the scope of this Commission's jurisdiction.

{¶ 32} Therefore, we need not consider in this proceeding every possible ruse or scenario in which a Reseller might attempt to subvert the Safe Harbor protections. Such determinations should be based upon the facts and circumstances presented in a particular complaint case. Accordingly, we find these arguments for rehearing to be without merit.

## 2. USE OF AFFILIATED SUPPLIERS

{¶ 33} With respect to their second argument listed under their first assignment of error, AEP & Duke claim that the Safe Harbor protections are fundamentally flawed because such protections could be nullified through the use of an affiliated supplier. AEP & Duke maintain that if the Safe Harbor provisions are retained under the third prong of the *Shroyer* Test, the two branches of the Safe Harbor should be applied conjunctively to avoid the potential problem of a Reseller evading the second branch's price test through the use of an affiliated competitive retail electric supplier (CRES). They request that a "no markup" restriction be imposed to prevent a Reseller from colluding with an affiliated CRES to circumvent the first branch of the Safe Harbor by claiming that the Reseller is simply passing through its annual costs from the CRES at the affiliated supplier's inflated rates, while charging substantially more than what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariff.

{¶ 34} IEU-Ohio, on the other hand, contends that the AEP & Duke proposal goes well beyond what is permitted under Ohio law and the Commission's authority to impose tariff restrictions preventing resale of electric supply with respect to CRES providers. IEU-Ohio asserts that the AEP & Duke hypothetical problem involving kickbacks between a reseller and its affiliated CRES provider has not been demonstrated but, in any event, the Commission has no authority under R.C. 4928.03, to set the prices of a CRES provider, directly or indirectly.

{¶ 35} As discussed in the Jun. 21, 2017 Entry at ¶¶ 20-22, the Commission will apply the *Shroyer* Test on a case-by-case basis when determining its jurisdiction with respect to the

resale or redistribution of public utility services. As noted above, such case-by-case analysis would include the Reseller's use of an affiliated supplier in an attempt to invoke Safe Harbor protections. Therefore, this argument for rehearing should be rejected. The AEP & Duke "no markup" proposal will be further examined below in considering their third and fourth assignments of error.

### 3. CLARIFICATION REGARDING SAFE HARBORS

{¶ 36} In their third argument of their first ground for rehearing, AEP Ohio and Duke urge the Commission to clarify that the Safe Harbors only apply to the third prong of the *Shroyer* Test, without implication for any claims under the first and second prongs. The Jun. 21, 2017 Entry clearly stated, at ¶¶ 4, 28, 40, that the Relative Price Test and Safe Harbor exceptions are adopted for consideration of residential submetered arrangements under the third prong of the *Shroyer* Test. Further, as noted in the Jun. 21, 2017 Entry at ¶4, an affirmative answer to any one of the three prongs of the *Shroyer* Test may be sufficient to demonstrate that an entity is operating as a public utility subject to the Commission's jurisdiction, even with respect to commercial and industrial resale arrangements. Aside from such clarification, the Commission has not modified the *Shroyer* Test with respect to commercial and industrial submetered arrangements in this proceeding. Accordingly, no further clarification is necessary, and the AEP & Duke request for rehearing on this basis is denied.

#### D. *Commercial and Industrial Submetered Arrangements*

{¶ 37} Aside from the three arguments listed above, AEP Ohio and Duke include an additional claim under their first assignment of error. They contend that the application of the Safe Harbor provisions to a wide range of Resellers outside of the traditional landlord-tenant context is inconsistent with, and unsupported by, statute and case law. They acknowledge that ¶28 of the Jun. 21, 2017 Entry clarified that the Commission's traditional application of the *Shroyer* Test to commercial and industrial submetered arrangements will still apply on a case-by-case basis, and that the Relative Price Test and Safe Harbor

provisions would only apply to residential submetered arrangements. However, AEP & Duke argue that the statutory definition of “public utility” under R.C. 4905.02, makes no distinction between the residential class and other customer classes.

{¶ 38} IEU-Ohio asserts that AEP Ohio’s April 27, 2016 motion for a tariff amendment that was filed in *Ohio Consumers’ Counsel v. Ohio Power Co.*, Case No. 16-782-EL-CSS, would, if approved by this Commission, prohibit any Reseller from marking up the price of service from an electric distribution utility (EDU), including those involving commercial and industrial submetered arrangements. IEU-Ohio argues that there has been no showing that commercial or industrial customers are in any need of the protection that such a tariff restriction would impose, and that such proposal is unlawful under R.C. 4928.40(D), which provides that an EDU shall not prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on resale of electric generation service.

{¶ 39} As noted in the Jun. 21, 2017 Entry at ¶¶ 2, 3, this COI proceeding was initiated to solicit input from all stakeholders with respect to submetering arrangements in Ohio as a result of Mr. Whitt’s complaint against NEP in Case No. 15-697-EL-CSS, which involved submetered electric, water, and sewer services to the owner of a residential condominium. No complaints regarding commercial or industrial submetered arrangements have surfaced during the pendency of this proceeding. While the comments from stakeholders, including the Residential Advocates, urge us to clarify that the Relative Price Test and Safe Harbor provisions will only apply to residential submetered arrangements, we find that the Jun. 21, 2017 Entry is sufficiently clear, at ¶¶ 27, 28, on this point. Furthermore, AEP & Duke fail to cite any statutory authority or case law to support their contention that this Commission must not distinguish residential from commercial or industrial submetered arrangements. In the absence of any complaints regarding commercial or industrial submetered arrangements, we see no reason to extend the application of the Relative Price Test and Safe

Harbor provisions beyond residential submetered arrangements at this time. Therefore, the AEP & Duke first assignment of error, including all arguments raised therein, will be denied.

*E. No-markup Proposal and the Certified Territory Act*

{¶ 40} In the AEP & Duke second and FirstEnergy first assignments of error, they assert that the Jun. 21, 2017 Entry is unreasonable and unlawful because it does not expressly provide that a Reseller must immediately cease operations if it fails the Relative Price Test, and can not meet either Safe Harbor provision. The EDUs contend that under such a scenario, the rebuttable presumption would trigger Commission jurisdiction over the Reseller, and that a Reseller operating as a public utility under those circumstances is violating the Certified Territory Act under R.C. 4933.81 through 4933.90. Therefore, they argue, the Reseller must immediately cease its operations.

{¶ 41} In AEP & Duke's third and fourth assignments of error, they assert that the Relative Price Test and Safe Harbor exceptions established in the Jun. 21, 2017 Entry are inconsistent with R.C. 4905.02 and 4905.03 because these modifications to the *Shroyer* Test will still permit submetering entities to earn substantial profits while escaping regulation as public utilities. AEP & Duke suggest that the Commission revise the Jun. 21, 2017 Entry's adoption of a zero percentage threshold under the Relative Price Test and, instead, apply a rebuttable presumption that a Reseller is a public utility if it charges more than what it pays for master meter service.

{¶ 42} AEP & Duke are joined by FirstEnergy as well as OCC/OPLC and OPAE (the Residential Advocates) in supporting a "no-markup" rule for residential submetered arrangements. Under such a rule, any submetering arrangements that did generate a profit would be eliminated, because such arrangements would violate the Certified Territory Act. In essence, such a rule would guarantee that any profit derived from the purchase and resale of utility service would belong to the public utility rather than the property owner.

{¶ 43} In their memoranda contra, Direct Energy, BOMA, and IEU-Ohio, object to the AEP & Duke proposal to apply the two Safe Harbor branches conjunctively. Direct Energy counters that a no-markup rule would result in the unlawful regulation of retail supplier pricing, and may negatively impact Ohio's retail market if Resellers are found to be public utilities based on a comparison of CRES prices to EDU rates, which are based on the usage and consumption of the building and may not translate to residential costs or usage. Direct Energy contends that the Relative Price Test and Safe Harbors established in the Jun. 21, 2017 Entry are a reasonable and appropriate way to evaluate the reasonableness of a submetering company's charges.

{¶ 44} In a subpart of their third assignment of error, AEP & Duke also argue that the Jun. 21, 2017 Entry violated R.C. 4903.09, because it failed to address the EDUs' argument that a Reseller who marks up master meter service and resells it at a profit is "engaged in the business of supplying electricity" under R.C. 4905.02 and 4905.03. They contend that the Jun. 21, 2017 Entry does not "seriously engage" with statutory analysis, or address how the Relative Price Test and Safe Harbors are consistent with the "engaged in the business of supplying electricity" standard. They further assert that cases such as *Pledger*, 109 Ohio St.3d 463; 2006-Ohio-2989, 849 N.E.2d 14, and *FirstEnergy ETP*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, did not address new forms of submetering or submetering companies such as NEP. AEP & Duke allege that "... an entity such as NEP, which sells electric service to 30,000 customers on over one hundred properties, is clearly 'engaged in the business of supplying electricity,' not a landlord reselling on his own property." AEP & Duke application for rehearing (Jan. 7, 2017) at 13.

{¶ 45} We find these arguments to be without merit. The Jun. 21, 2017 Entry expressly considered, at ¶¶ 15-23, 29-31, the statutory interpretations and precedent regarding the Commission's jurisdiction over submetering practices. Despite the assertions of the EDUs and Residential Advocates, there is no evidentiary record in this proceeding to support any of the claims of harm allegedly caused by Reseller operations, or to explain why such



operations should be considered a “new” form of submetering. Jun. 21, 2017 Entry at ¶24. More importantly, the AEP & Duke arguments ignore that the Court has already determined that an electric utility cannot prohibit the resale of electric service by a landlord to a tenant if the resale takes place on the landlord’s property. See, *FirstEnergy ETP*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶9, upholding this Commission’s decision in *Brooks*, Case No. 94-1987-EL-CSS, (May 8, 1996), which followed *Shopping Centers Assn.*, 3 Ohio St.2d 1, 32 O.O.2d 1, 208 N.E.2d 923 (1965). In its most recent decision on this topic, the Court rejected the arguments that a landlord need only buy and resell water to be deemed a water-works company regulated under R.C. 4905.03. In a landlord-tenant submetered arrangement, it is the landlord, rather than the tenant, who is the consumer of the service provided by the utility. *Pledger*, 109 Ohio St.3d 463, 466; 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 26-28, 35-39.

{¶ 46} In this proceeding, the EDUs fail to distinguish how their no-markup proposal, that any Reseller who marks up master meter service and resells it at a profit is “engaged in the business of supplying electricity” under R.C. 4905.02 and 4905.03, is substantially different than those rejected by the Court in *Pledger*. Further, we need not speculate or pass upon the appropriate sanctions or remedies in this proceeding, should we find a Reseller in violation of R.C. 4933.83(A) in a future complaint case. Accordingly, rehearing on all of these grounds will be denied.

#### ***F. Utility Tariffs and Submetering.***

{¶ 47} The AEP & Duke fifth assignment of error states that the Commission should clarify that its decisions in this docket do not limit or foreclose other avenues of addressing submetering, including utility tariffs concerning that issue. They observe that the Jun. 21, 2017 Entry, at ¶ 18, rejected the Residential Advocates’ contention that all Ohio electric utilities should be required to adopt tariffs in order to prevent abuses in residential submetering arrangements. AEP requests clarification that the Commission has not foreclosed the use of tariffs such the one it has proposed in the tariff amendment filed April 27, 2016 in *Ohio Consumers’ Counsel v. Ohio Power Company*, Case No. 16-782-EL-CSS. In their

seventh assignment of error, OCC/OPLC join AEP & Duke in arguing that the Jun. 21, 2017 Entry unlawfully and unreasonably fails to issue a moratorium on the resale of public utility services by submetering entities, as requested in Case No. 16-782-EL-CSS.

{¶ 48} As noted above, IEU-Ohio argues that, under R.C. 4928.40(D), an EDU can not prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service. IEU-Ohio asserts that under the proposed moratorium, an EDU would be empowered to terminate service to parties served under a shared services arrangement if the EDU decided that any fee, even a reasonable fee agreed to by the parties to cover administrative costs, constituted a markup. In addition, IEU-Ohio argues that under the proposed moratorium, an EDU could terminate service if charges under a shared services arrangement is allocated in any manner other than by actual usage, which would create issues in instances where the end user's utility service is not metered. Finally, IEU-Ohio contends that this Commission is ill-suited to police the proposed resale restrictions on shared services arrangements.

{¶ 49} As discussed in the Jun. 21, 2017 Entry at ¶23 and in our discussion of the no-markup proposal above, these arguments ignore that the Court has already determined that an electric utility cannot prohibit the resale of electric service by a landlord to a tenant if the resale takes place on the landlord's property. *FirstEnergy ETP*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶ 9, and *Pledger*, 109 Ohio St.3d 463, 466; 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 26-28, 35-39. Accordingly, these assignments of error will be denied.

#### **G. Website Calculators for Submetered Residents**

{¶ 50} Finally, AEP & Duke complain that the Jun. 21, 2017 Entry at ¶41 requires the EDUs to assist Staff in the creation of a website tool or other mechanism to provide submetered residential customers with an estimated calculation of the charges a customer would have paid the local public utility for equivalent usage, on a monthly total bill basis. AEP & Duke assert that such requirement is unprecedented, unreasonable, and unduly burdensome.

{¶ 51} We do not believe that the requirement to provide Staff with a spreadsheet, website tool, or other mechanism for performing appropriate calculations constitutes an unreasonable burden upon any EDU. Accordingly, this assignment of error is rejected, and the AEP & Duke application for rehearing will be denied. Moreover, as FirstEnergy's two assignments of error have been considered with AEP & Duke's second, third, and fourth assignments of error, and are rejected for the reasons set forth above, FirstEnergy's application for rehearing should be denied.

#### *H. Consumer Benefits and Regulatory Protections*

{¶ 52} In their application for rehearing, OCC/OPLC list seven separate assignments of error, the first and last of which seek a moratorium on the resale of residential submetered utility service, and assert that the Safe Harbor under the Jun. 21, 2017 Entry unreasonably allows Resellers to impose excessive charges for utility service which may not reflect the Reseller's actual costs.

{¶ 53} As discussed in the Jun. 21, 2017 Entry at ¶23, and in our consideration of the no-markup proposal and tariff restrictions above, these arguments ignore established precedent that an EDU cannot prohibit the resale of electric service by a landlord to a tenant if the resale takes place on the landlord's property. *FirstEnergy ETP*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶9, and *Pledger*, 109 Ohio St.3d 463, 466; 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 26-28, 35-39. Moreover, there is no evidentiary record in this proceeding to support any of the claimed harms allegedly caused by Reseller operations. Jun. 21, 2017 Entry at ¶ 24. However, the Relative Price Test and Safe Harbors should curtail the potential for abuse by Resellers of submetered residential utility service, and any evidence of excessive or unfair charges should be considered on a case-by-case basis within the context of a particular complaint proceeding. Accordingly, this ground for rehearing will be denied.

{¶ 54} In their second assignment of error, OCC/OPLC assert that the Safe Harbor unreasonably strips public utility benefits and regulatory protections from consumers. Similarly, OPAE contends, in its first assignment of error, that the Commission modified the

*Shroyer* Test to protect Ohio residential consumers trapped in submetered arrangements, but that such protection can't be accomplished on a case-by-case basis. Rather, OP&E contends, the Commission should grant residential consumers in submetered arrangements the same rights and protections afforded to all other residential consumers under R.C. 4905.22, 4905.30, 4905.32, 4909.18, 4928.02, 4928.08(B), 4928.10, and 4929.02 and under Ohio Adm.Code 4901:1-18, 4901:1-21, and 4901:1-24.

{¶ 55} IEU-Ohio disputes OP&E's argument against a case-by-case review of submetering arrangements to determine jurisdiction. IEU-Ohio asserts that there is no categorical answer to the question of whether submetering companies, condominium associations, or similarly situated entities, including their agents, are public utilities subject to Commission jurisdiction. IEU-Ohio argues that the Commission's decision in this investigation did not alter the legal requirement that a public utility be regulated.

{¶ 56} The Jun. 21, 2017 Entry reviewed, at ¶¶ 17-23, the case law applicable to the fundamental question of whether an entity is operating as a public utility. As noted there, and in our discussions of the no-markup and tariff restriction proposals above, these arguments ignore the *FirstEnergy ETP* and *Pledger* holdings that prohibit an electric utility from restricting the resale of electric service by a landlord to a tenant if the resale takes place on the landlord's property. *FirstEnergy ETP*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶9, and *Pledger*, 109 Ohio St.3d 463, 466; 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 26-28, 35-39. While we believe that the Relative Price Test and Safe Harbors adopted in the Jun. 21, 2017 Entry should curtail any abusive practices with respect to submetered residential utility service, this Commission can not simply impose public utility benefits and regulatory protections without statutory basis. Accordingly, these assignments of error are denied.

#### ***I. Safe Harbor Burdens or Special Procedures.***

{¶ 57} In their third assignment of error, OCC/OPLC contend that the Jun. 21, 2017 Entry unreasonably places the burden on residential consumers to trigger the rebuttable presumption on a case-by-case basis, and to demonstrate that a Reseller fails to meet one of

the Safe Harbor provisions for avoiding Commission jurisdiction. They also contend, in their fourth assignment of error, that the Jun. 21, 2017 Entry should have established a detailed procedure for initiating complaints of submetered residential consumers who are being charged more than they would have paid for service from the local public utility.

{¶ 58} As discussed in the Jun. 21, 2017 Entry at ¶¶34, 39-41, the development of a website tool or other mechanism will provide submetered residents with an estimated calculation of the charges the resident would have paid the local public utility for equivalent usage, on a monthly total bill basis, under the utility's default service tariffs. If a resident demonstrates that he or she has been charged more than what the resident would pay for comparable utility service, it will give rise to a rebuttable presumption that the Reseller's provision of service is not ancillary to the landlord's primary business, and the burden will then be on the Reseller to demonstrate that its charges fall within one of the two Safe Harbor exceptions. This procedure should not place an undue burden on a submetered resident in asserting a claim, but will allow complaints against Resellers to be expeditiously resolved on a case-by-case basis using the Relative Price Test. Moreover, submetered residential customers may simply call the Commission's Consumer Call Center to get help in calculating the Relative Price Test and applying the Safe Harbor exceptions. Accordingly, these grounds for rehearing will be denied.

#### *J. Common Area Charges*

{¶ 59} As their fifth and sixth assignments of error, OCC/OPLC claim that the Jun. 21, 2017 Entry unreasonably allows submetering entities to pass on costs associated with common areas, and unreasonably excludes common area charges from the total bill cap. Further, they assert that submetering entities should be required to itemize all charges for common areas. Similarly, in its second ground for rehearing, OPAE contends that the Relative Price Test is inadequate to protect residential consumers, and will not check abusive practices by Resellers. OPAE argues that since a Reseller may not pay the same residential service distribution rates, customer charges, and riders that a public utility's residential

customer pays for default service, the total bill of the Reseller will not be comparable to the utility's default tariff, so that the Reseller's charges would not reflect the Reseller's cost of service.

{¶ 60} We first note that OCC/OPLC offer no statutory basis for their suggestion that all submetering entities be required to itemize all charges for common areas. While this Commission may lack the statutory authority to implement such a recommendation, we can scrutinize common area and other charges, on a case-by-case basis, in determining whether a Reseller has complied with the Safe Harbor provisions. As explained in the Jun. 21, 2017 Entry, the Reseller's charges under the Relative Price Test should include any administrative fees or similar charges, but exclude charges for common areas. For common areas, the Commission will not assert jurisdiction over a Reseller where a Reseller is simply passing through its costs of providing a utility service charged by a local public utility (and competitive retail service provider, if applicable) to its submetered residents at a given premises. Jun. 21, 2017 Entry at ¶¶ 44, 49.

{¶ 61} Furthermore, with respect to OPAE's assertions, the costs of any particular riders that are paid by a Reseller are not relevant in determining the Safe Harbor provisions. Rather, it is the total cost paid by the Reseller, and the lack of any profit in passing through such total cost, that will allow a Reseller to invoke the Safe Harbor provision under the third prong of the *Shroyer* Test, and thus avoid Commission jurisdiction. As discussed above, these calculations will be considered on a case-by-case basis if appropriately raised in a complaint proceeding. Accordingly, these assignments of error are rejected, and the Residential Advocates' applications for rehearing will be denied.

#### **K. AP&L's Proposed Threshold**

{¶ 62} As its only ground for rehearing, AP&L argues that the Jun. 21, 2017 Entry is unreasonable and unlawful because the second branch of the safe harbor, described at ¶40, should have allowed a Reseller's charges to exceed, by at least five percent, the costs a resident would have paid the applicable public utility for similar usage (5% threshold).

AP&L contends that such a 5% threshold is necessary to account for any minor differences between the residential consumer's actual charges and the utility's charges over the 12-month period.

{¶ 63} In its memorandum contra, OCC argues that AP&L's application for rehearing should be denied because the proposed 5% threshold is arbitrary, and would create an invalid assumption that a submetering entity is not charging consumers excessive rates for utility service.

{¶ 64} AP&L's arguments were fully considered and rejected in the Jun. 21, 2017 Entry at ¶¶42-49. The two Safe Harbor provisions were not adopted to benefit Resellers. Rather, the second Safe Harbor is a reasonable exception to the Relative Price Test because the resident is not harmed under such a submetered arrangement since the resident is paying no more than what she or he would have paid the local public utility for equivalent usage on a total bill annualized basis. Clearly, the resident would be harmed if any percentage were to be allowed under the second Safe Harbor. Accordingly, AP&L's application for rehearing will be denied.

#### IV. ORDER

{¶ 65} It is, therefore,

{¶ 66} ORDERED, That each of the applications for rehearing of the Jun. 21, 2017 Entry be denied as set forth above. It is, further,

{¶ 67} ORDERED, That a copy of this Fourth Entry on Rehearing be served upon all parties of record.

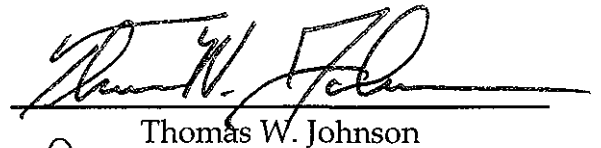
THE PUBLIC UTILITIES COMMISSION OF OHIO



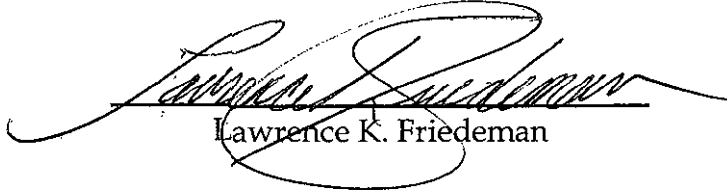
Asim Z. Haque, Chairman



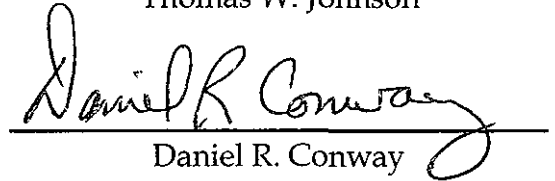
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman

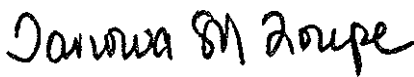


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