

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
CYNTHIA WINGO,**

COMPLAINANT,

V.

CASE NO. 16-2401-EL-CSS

**NATIONWIDE ENERGY PARTNERS, LLC,
ET AL.,**

RESPONDENTS.

THIRD ENTRY ON REHEARING

Entered in the Journal January 9, 2018

I. SUMMARY

{¶ 1} The Commission denies the Complainant's application for rehearing of the January 17, 2018 First Entry on Rehearing, and grants Ohio Power Company's application for rehearing of the November 21, 2017 Finding and Order, but only to the extent of allowing intervention.

II. PROCEDURAL HISTORY

{¶ 2} On December 15, 2016, this Complaint was filed on behalf of Cynthia Wingo (Complainant or Ms. Wingo) against Nationwide Energy Partners, LLC (NEP) regarding submetered electric, water, and sewer service to Ms. Wingo's residence at the Gateway Lakes Apartments in Grove City, Ohio (Gateway Lakes), for which NEP supplies or arranges for the supply of such services to Gateway Lakes residents. NEP filed an answer on January 5, 2017, denying that it provides jurisdictional public utility services.

{¶ 3} Ms. Wingo was subsequently granted leave to amend her Complaint to add Gateway Lakes Acquisition LLC (GLA) and Borrer Properties Management, LLC (Borrer), as the owner and property manager of Gateway Lakes, respectively; and to address the Commission's recent decision regarding its jurisdiction over submetered arrangements in *In re the Commission's Investigation of Submetering in the state of Ohio*, Case No. 15-1594-AU-COI (*Submetering Investigation*), Second Entry on Rehearing (Jun. 21, 2017) (*Jun. 21, 2017 COI*

Entry). On September 29, 2017, NEP filed an amended answer and amended motion to dismiss the complaint for lack of jurisdiction.

{¶ 4} On November 21, 2017, the Commission issued a Finding and Order in this case (Nov. 21, 2017 Order) finding that the Complainant had failed to state reasonable grounds for hearing as required by R.C. 4905.26, and granting NEP's motion to dismiss the Complaint.

{¶ 5} Applications for rehearing of the Nov. 21, 2017 Order were filed by the Ohio Power Company (AEP Ohio or Utility) on December 21, 2017, and by the Complainant on December 22, 2017.

{¶ 6} On January 2, 2018, NEP filed memoranda contra to the applications for rehearing of both AEP Ohio and the Complainant alleging, inter alia, that Ms. Wingo's application for rehearing was not timely filed in accordance with Ohio Adm.Code 4901-1-02(D)(4).

{¶ 7} On January 9, 2018, the Complainant filed a motion for leave to file a reply memorandum in support of her application for rehearing.

{¶ 8} On January 17, 2018, the Commission issued an Entry on Rehearing granting further time to consider AEP Ohio's application for rehearing. The Jan. 17, 2018 Entry also granted Ms. Wingo's motion for leave to file a reply memorandum, but ultimately concluded that the Complainant's application for rehearing was not timely filed pursuant to R.C. 4901.10, 4901.13 and Ohio Adm.Code 4901-1-02(D)(4). Accordingly, the Commission found that it had no jurisdiction to consider Ms. Wingo's application for rehearing and it was, therefore, dismissed. Jan. 17, 2018 Entry at ¶¶ 1, 10-15.

{¶ 9} On February 16, 2018, the Complainant filed an application for rehearing of the Jan. 17, 2018 Entry; and NEP filed a memorandum contra on February 26, 2018.

{¶ 10} On March 14, 2018, the Commission issued a Second Entry on Rehearing granting further time to consider Complainant's request for rehearing of the Jan. 17, 2018 Entry.

III. DISCUSSION

{¶ 11} R.C. 4903.10 and Ohio Adm.Code 4901-1-35 provide that any party who has entered an appearance in a Commission proceeding may apply for rehearing of a Commission order with respect to any matters determined therein by filing an application for rehearing within 30 days after the entry of the order upon the Commission's journal.

A. *The Complainant's Application for Rehearing of the Nov. 21, 2017 Order was not timely filed.*

{¶ 12} The Complainant's application for rehearing of the Jan. 17, 2018 Entry, lists a single assignment of error: that the Commission violated R.C. 4903.10 by refusing to exercise jurisdiction to consider her application for rehearing of the Nov. 21, 2017 Order on its merits. In support of this argument, the Complainant admits that her application for rehearing of the Nov. 21, 2017 Order was filed on December 21, 2017 at 5:47 p.m., and that R.C. 4903.10 provides that an application for rehearing must be "filed" within 30 "days" of the underlying order. The Complainant cites *Bohacek v. Ohio Bur. of Emp. Services* (8th Dist. 1983), 9 Ohio App.3d 59, syllabus ¶2, 458 N.E.2d 408, in contending that a document is "filed" when it is "received" by the tribunal. The Complainant also asserts that "day" means a full calendar day: "Fractions of a day are not generally considered in the legal computation of time, and the day on which an act is done or an event occurs must be wholly included or excluded." *Greulich v. Monnoin*, 142 Ohio St. 113, 117, 50 N.E.2d 310, 149 A.L.R. 477, 26 O.O. 314 (1943). The Complainant contends that, as the Commission's official records show that her application for rehearing of the Nov. 21, 2017 Order was actually "received" on the thirtieth "day" following the issuance of that order, the Commission has jurisdiction to consider her application.

{¶ 13} The Complainant contends that the Jan. 17, 2018 Entry's statutory interpretations are unreasonable and unlawful, and reached an arbitrary result, because the only issue was whether the filing was actually received by the Commission on December 21, 2017. The Complainant argues that R.C. 4901.10 requires the Commission to be open from 8:30 a.m. to 5:30 p.m., but says nothing about how or when the Commission must accept filings. The Complainant notes that Ohio Adm.Code 4901-1-02(A)(3) requires the Docketing Division to be open from 7:30 a.m. to 5:30 p.m., Monday through Friday, and asserts that if R.C. 4901.10 requires the Commission to only accept filings between 8:30 a.m. and 5:30 p.m., then every filing ever accepted between 7:30 a.m. and 8:29 a.m. is unlawful and invalid. The Complainant reasons that if the Commission has authority to accept filings before 8:30 a.m., then it also has authority to accept filings after 5:30 p.m.

{¶ 14} The Complainant also contends that R.C. 4903.10 is a "remedial" law, which shall be liberally construed in order to promote its object and assist the parties in obtaining justice, pursuant to R.C. 1.11. The Complainant criticizes the Jan. 17, 2018 Entry for strictly applying Ohio Adm.Code 4901-1-02(D)(4), rather than broadly construing the statutory terms "file" and "day." The Complainant maintains that the constructive date of filing is not controlling under R.C. 4903.10; rather it is the date the filing was actually received by the Commission, which was December 21, 2017.

{¶ 15} Finally, the Complainant observes that the deadline for filing an application for rehearing is a statutory, jurisdictional deadline, unlike any other deadline that parties must typically observe in Commission proceedings where the Commission may grant waivers of its own rules. The Complainant suggests that the Commission could extend the filing deadline to 11:59 p.m. for just such filings with a statutory deadline. This would bring the Commission's rules closer to those adopted in the Franklin County Ohio Court of

Common Pleas and the U.S. Southern District of Ohio, where all filings are permitted up until midnight of the due date.¹

{¶ 16} In its memorandum contra, NEP counters that the Complainant is essentially arguing that the Commission's electronic filing (e-filing) deadline should be 11:59 p.m. rather than 5:30 p.m. NEP notes that Ohio Adm.Code 4901-1-02(D)(4) provides "that any e-filed document received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day." NEP argues that R.C. 4901.13 authorizes the Commission to adopt and publish rules to govern its proceedings, and that administrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law. *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 47, Syllabus ¶1, 554 N.E.2d 97 (1990).

{¶ 17} NEP further notes that when the Supreme Court of Ohio revised Rule 13 of the Ohio Rules of Appellate Procedure to allow for the adoption of e-filing systems, it required that local rules include provisions to specify the days and hours during which electronically transmitted documents will be received, and when such documents will be considered to have been filed. App.R.13(A)(2). NEP also notes that the Court's own rule, S.Ct.Prac.R. 3.02(A)(3)(e), is virtually identical to the Commission's in providing that "documents received after 5:00:00 p.m. local observed time in Columbus, Ohio through the E-Filing Portal shall not be considered for filing until the next business day." Moreover, NEP cites *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 105 Ohio St.3d 1211, 2005-Ohio-1023, as an example of where the Court has refused to accept an appeal that failed to comply with the Court's rules of practice.

{¶ 18} NEP also argues that Ohio courts have held that filing can only occur if a pleading is actually delivered and accepted by the correct officer during normal business hours, citing *Piper v. Burden*, 16 Ohio App.3d 361, 362 (3d. Dist. 1984) ("[O]nly a notice of appeal left at the office of the clerk of courts with the clerk, himself, or with his deputy while

¹ See, Franklin County Ohio Court of Common Pleas, Sixth Amended Admin. Order, at 9; and Southern District of Ohio Policies and Procedures, Electronic Case Filing Procedures Guide (Jan. 2016) at 1.

the office is open for business, is required to be filed by the clerk.”); *King v. Paylor*, 69 Ohio App. 193, 43 N.E.2d 313 (1st. Dist. 1942) (rejecting the filing of a notice of appeal as timely when the appellant delivered the notice to the clerk of courts outside of the clerk’s normal business hours and left the notice on the clerk’s desk); *Id.* at 196 (“[A] filing can only be accomplished by bringing the paper to the notice of the officer, so that it can be accepted by him as official custodian.”); *Karwan v. Schmidt*, 8th Dist. Cuyahoga No. 36465, 1977 Ohio App. LEXIS 7795, 1977 WL 201565 (Sep. 29, 1977) (pleading not filed when it was left on the clerk’s desk who was extremely busy at the time). NEP asserts that merely transmitting the document to the clerk’s office, whether by leaving it on an empty chair after hours, or e-filing it after-hours and outside the Commission’s same-day filing window, is not enough; the document must be timely transmitted *and accepted* for filing in accordance with the Commission’s rules in order to constitute a valid filing. NEP also cites two 8th District Court of Appeals decisions where the court has distinguished between a party’s electronic submission of a document, and the Clerk’s acceptance of that filing, in holding that e-filings rejected by the clerk for technical deficiencies were untimely. *Culler v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 101386, 2014-Ohio-5434; and *Rutti v. Dobeck*, 8th Dist. Cuyahoga No. 105634, 2017 WL 5903455, 2017-Ohio-8737.

{¶ 19} We first note the relevant statutes and several rules necessary for review in our decision. R.C. 4903.10 provides that applications for rehearing “shall be filed within thirty days after the entry of the order upon the journal of the commission.” The General Assembly has also established the hours of the Commission, in R.C. 4901.10, stating that the Commission offices “shall be open between eight-thirty a.m. and five-thirty p.m. throughout the year, Saturdays, Sundays, and legal holidays excepted.” In Ohio Adm.Code 4901-1-02(A)(3), the Commission has determined the docketing division will be open earlier (seven-thirty a.m.) than what is required by statute.

{¶ 20} Ohio Adm.Code 4901-1-02, entitled “Filing of pleadings and other documents,” sets forth the Commission rules for filing documents with the Commission’s Docketing Division, whether it be via paper filing, facsimile transmission (fax), or e-filing.

Subsection (D) of this rule contains the specific e-filing provisions which require that all filings comply with the posted e-filing manual and technical requirements (covering such details as virus detection, and acceptable electronic file sizes and formats). Ohio Adm.Code 4901-1-02(D)(4) provides that an e-filed document will be considered filed as of the date and time recorded on the confirmation page that is electronically inserted as the last page of the filing upon receipt by the Commission, except that any e-filed document received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day. Further, the rule provides that the Commission's Docketing Division may reject any filing that does not comply with the electronic filing manual and technical requirements, is unreadable, includes anything deemed inappropriate for inclusion on the Commission's web site, or is submitted for filing in a closed or archived case. The Commission specifically has provided guidance regarding timing and acceptance in Ohio Adm.Code 4901-1-02(D)(7), noting that a person making an e-filing bears the risk of transmission or other failure. More importantly, subparagraph (D)(6) of the rule specifically states that: "The commission's docketing division closes at five-thirty p.m. To allow time for same-day review and acceptance of e-filings, persons making e-filings are encouraged to make their filings by no later than four p.m."

{¶ 21} The Commission denies Complainant's second rehearing application, and affirms our findings previously stated in the Jan. 17, 2018 Entry. The Complaint's original application for rehearing must be dismissed as it was not timely filed pursuant to R.C. 4903.10 and Ohio Adm.Code 4901-1-02(D)(4). As noted above, the Commission's 5:30 e-filing deadline under Ohio Adm.Code 4901-1-02(D)(4) is consistent with the Court's own rule, S.Ct.Prac.R. 3.02(A)(3)(e), in delaying acceptance of after-hours e-filings until the next business day. The time stamp on the confirmation page of the Complainant's original application for rehearing states that it was filed on December 21, 2017 at 5:47 p.m. Therefore, pursuant to Ohio Adm.Code 4901-1-02(D)(4), an e-filed document will be considered filed as of the date and time recorded on the confirmation page that is electronically inserted as the last page of the filing upon receipt by the Commission, except that any e-filed document

received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day. Accordingly, the Complainant's original rehearing application is considered filed on December 22, 2107, which makes it an untimely application under R.C. 4903.10.

{¶ 22} Further, the Complainant's late e-filing in this case is similar to those cases cited by NEP where the paper filing was not actually delivered and accepted by the correct officer during normal business hours. See, *Piper*, 16 Ohio App.3d 361, 362 (3d. Dist. 1984), and *King*, 69 Ohio App. 193, 43 N.E.2d 313 (1st. Dist. 1942). The Commission's rules provide for the filing and acceptance of documents, whether paper filed or electronically filed, during business hours for the Docketing Division. These analogous cases cited by NEP involve paper filings received by the clerk of courts outside of business hours, and support the Commission's conclusions regarding e-filing in this case.

{¶ 23} We do not believe that the Jan. 17, 2018 Entry conflicts with *Greulich*, 142 Ohio St. 113, 50 N.E.2d 310, 149 A.L.R. 477, 260.0.314 (1943) as the Complainant asserts, as that case is about the calculation of time to determine the termination date of an insurance policy pursuant to the terms of the contract. In support of rehearing, the Complainant relies on the Court in *Greulich* noting the general rule summarized in 39 Ohio Jurisprudence, 196, Section 10, under the subject of computation of time: "Fractions of a day are not generally considered in the legal computation of time, and the day on which an act is done or an event occurs must be wholly included or excluded. 'The term 'day,' in law, embraces the entire day..." *Greulich*, at 113, 117. However, the proposition of law cited in *Greulich*, relating to the definition of "the term day" under an insurance policy, is inapplicable to the issue before the Commission where we are interpreting a clear statute and rule regarding filing and acceptance of documents. The Court in *Greulich* viewed the insurance policy in terms of contract law, noting that "We believe that it is a matter of common knowledge as well as a principle of law that a contract which, by its terms, expires on a certain day, remains in force for the whole of that day unless by its express wording it is limited to a certain time of the day upon which it expires. In the absence of an express limitation, the law does not take

notice of a fraction of a day.’” *Greulich* at 118, citing to *Garelick v. Rosen*, 274 N.Y. 64, 8 N.E.2d 279, 280.

{¶ 24} The Court’s interpretation of an insurance policy in *Greulich* does not require the Commission to be available to accept filings 24 hours each day. Ohio Adm.Code 4901-1-02(D)(4) clearly requires that a document be filed by 5:30 p.m., in order to be timely filed. The Complainant maintains that the actual date that her document was uploaded to the Commission’s system, December 21, 2017, is controlling under R.C. 4903.10. The Complainant’s argument is simply wrong.

{¶ 25} Moreover, our holding in the Jan. 17, 2018 Entry is not in conflict with *Bohacek*, 9 Ohio App.3d 59, a decision cited by the Complainant for the proposition that a document is “filed” when it is “received” by the tribunal. *Bohacek* involved an appeal of an Unemployment Compensation Board of Review decision in which the Court stated that “[t]he only reasonable interpretation of the words ‘filing’ and ‘filed’ [of a paper document] is ‘actual delivery into official custody or files’ and not (as appellant would argue) ‘deposit into the mails’ (for receipt at some unknown future date).” *Bohacek* at 413. In that case, the 8th District Court of Appeals concluded that the appellant had failed to file a notice of appeal with the board within the 30-day time limit specified in R.C. 4141.28(O), where the appellant had filed her notice of appeal in the court of common pleas and mailed a copy to the board prior to the deadline, but the notice was not received by the board until the day after the deadline. Our decision, in fact, is consistent with *Bohacek* as the e-filed rehearing application was not received and accepted by the Commission until the following business day, as it was filed after 5:30 p.m. Just because an electronic file is uploaded to the Commission’s docketing system, such e-filed document is not automatically **accepted** as “filed.” The uploaded file must be readable and comply with all technical requirements, as well as be accepted by the Commission’s Docketing Division in accordance with Ohio Adm.Code 4901-1-02(D)(4).

{¶ 26} Further, nothing requires that the Commission's internet filing system be available for the full 24-hour calendar day. As discussed in the Jan. 17, 2018 Entry at ¶11, the Commission's e-filing rules were adopted to create a level playing field for all parties by reflecting the paper filing constraint under Ohio Adm.Code 4901-1-02(D)(4), which allows paper filings to be made at the Commission's Docketing Division between 7:30 a.m. and 5:30 p.m., Saturdays, Sundays, and legal holidays excepted. The adoption of a midnight e-filing deadline would create an unfair disadvantage for paper filing parties, and would require additional staffing resources to accept e-filings after 5:30 p.m.² With respect to Complainant's argument, a paper filing could be delivered to the Commission's offices after 5:30 p.m., but such delivery does not mean that the document would be required to be accepted as properly filed with the Commission's Docketing Division. Paper filings must be delivered by post, messenger, or in person to the Docketing Division's filing window by 5:30 p.m. on the business day on which they are due, pursuant to Ohio Adm.Code 4901-1-02.

{¶ 27} Further, the Commission must anticipate both planned and unplanned after-hours outages of the Commission's e-filing system, for which we are not staffed to remedy or even provide notice. Ohio Adm.Code 4901-1-02(D)(6) expressly encourages parties to e-file by 4:00 p.m., so as to allow for same-day review and acceptance of e-filings, and to provides parties with time to make paper or fax filings in the event of an unplanned outage of the e-filing system.

{¶ 28} The Complainant's arguments on rehearing have been considered by the Commission and are rejected. Any arguments in support of the Complainant's assignment of error not specifically discussed herein have been thoroughly and adequately considered

² See, *In re Amendment of Ohio Adm.Code Chapters 4901-1, et al.*, Case No. 11-776-AU-ORD, Finding and Order (Jan. 22, 2014) at 8-12, discussing the electronic filing provisions of Ohio Adm.Code 4901-1-02(D)(4).

by the Commission and are hereby denied. Accordingly, the Complainant's application for rehearing of the Jan. 17, 2018 Entry is denied.

B. AEP Ohio's Application for Rehearing of the Nov. 21, 2017 Order

{¶ 29} In its application for rehearing, AEP Ohio lists three assignments of error. It first asserts that the Nov. 21, 2017 Order unreasonably and unlawfully failed to grant the Utility's motion to intervene before dismissing the complaint, thereby denying AEP Ohio's right to be heard.

{¶ 30} R.C. 4903.221 provides that any person who may be adversely affected by a Commission proceeding may intervene in such proceeding, while R.C. 4903.221(B) and Ohio Adm.Code 4901-1-11 list four criteria for the Commission to consider in ruling upon a motion to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

1. AEP OHIO'S INTERVENTION

{¶ 31} AEP Ohio has a real and direct interest in this proceeding because it has the exclusive right to provide electric service to the Gateway Lakes owner as the property is located within AEP Ohio's service territory. Additionally, AEP Ohio's intervention will not unduly prolong or delay these proceedings, and its participation contributes to the full development and equitable resolution of the factual issues considered herein. In this case, AEP Ohio has an obligation to serve the Reseller within its service territory and its

intervention meets each of the four statutory criteria set forth above. Accordingly, AEP Ohio's first ground for rehearing and its motion to intervene will be granted.

2. NO GROUNDS FOR DELAY

{¶ 32} As its second ground for rehearing, AEP Ohio contends that the Commission should have held this proceeding in abeyance until it ruled on the pending applications for rehearing in the *Submetering Investigation* case.

{¶ 33} We disagree. In its application for rehearing, the Utility admits that this Commission has the inherent authority to control its own dockets and determine which issues will be heard in which docket. AEP Ohio also notes that the Commission exercised such authority in deferring the adjudication of the complaint *in re Whitt v. Nationwide Energy Partners, LLC*, Case No. 15-697-EL-CSS, pending the outcome of the broader *Submetering Investigation*. *Whitt*, Entry (Nov. 18, 2015) at 6-7. The Utility goes so far as to suggest that the Commission vacate the Nov. 21, 2017 Order until such time as the *Submetering Investigation* is concluded and reviewed by the Ohio Supreme Court (AEP Ohio application for rehearing at 5-6, 8).

{¶ 34} In the *Whitt* case, we deferred consideration of the merits of that complaint to allow for comments from non-party stakeholders in the *Submetering Investigation* docket. Those comments have now been considered, and we have found that the *Shroyer Test*, first 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, as modified by the Relative Price Test and Safe Harbors, provide appropriate tools in analyzing whether the Commission should assert jurisdiction over residential submetered arrangements based upon the facts in a particular case. *Jun. 21, 2017 COI Entry* at ¶¶ 22, 31.

{¶ 35} In the *Jun. 21, 2017 COI Entry*, we said that any complaint regarding residential submetered electric, natural gas, water or sewer services should be analyzed on a case-by-case basis under the *Shroyer Test* to determine if the submetered arrangement is subject to

Commission jurisdiction; and we added the Relative Price Test to our analysis under the third prong of that test to create a rebuttable presumption that the provision of such services is not ancillary the Reseller's primary business where the charges exceed what the resident would have paid for direct service from the applicable regulated utility. The *Jun. 21, 2017 COI Entry* also announced two Safe Harbors that would allow the Reseller to rebut the presumption: (1) where the Reseller is simply passing through its annual costs of providing a utility service charged by the public utility (and generation charges from a CRES provider, if applicable) to submetered residents at a given premises; or (2) where the Reseller's annual charges for a utility service to an individual submetered resident do not exceed 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 tariffs. *Jun. 21, 2017 COI Entry* at ¶¶ 40, 49-50.

{¶ 36} We find no benefit or basis for granting an indefinite delay in considering the specific arrangements in this case. The Nov. 21, 2017 Order in this case is consistent with our recent order in the Complainant's related case, *In re Wingo v. Nationwide Energy Partners, LLC*, Case No. 17-2002-EL-CSS, Finding and Order (Oct. 24, 2018) at ¶¶ 70-71, in applying the guidance developed in the *Jun. 21, 2017 COI Entry* to the specific facts in this case. Nov. 21, 2017 Order at ¶¶ 25-26. We again affirm our use of the Relative Price Test and Safe Harbor analysis in this case in determining that the provision of residential submetered electric service to the Complainant's Gateway Lakes apartment should not be subject to our jurisdiction. Accordingly, AEP Ohio's second ground for rehearing will be denied.

3. REASONABLE GROUNDS FOR THE COMPLAINT HAVE NOT BEEN STATED

{¶ 37} Finally, AEP Ohio contends that the Nov. 21, 2017 Order is unreasonable and unlawful in concluding that reasonable grounds for the Complaint have not been stated. The Utility argues that the Nov. 21, 2017 Order is unlawful and unreasonable because the two Safe Harbor provisions are unlawful and unreasonable when applied to for-profit submetering entities, like NEP. AEP Ohio asserts that third prong of the *Shroyer Test* is appropriate where the entity being tested has some business relationship with the end use

consumer beyond the provision of utility service, but is meaningless when it is applied to an entity, like NEP, whose sole business is the provision of utility service. AEP Ohio also seeks to incorporate its July 21, 2017 application for rehearing in the *Submetering Investigation*, in arguing that the appropriate test to use in determining if a submetering entity is a public utility should be whether the entity marks up master metering service and makes any profit from submetering (AEP Ohio application for rehearing at 8-10).

{¶ 38} AEP Ohio's "no markup" approach in analyzing jurisdictional submetering arrangements was considered and rejected in the *Jun. 21, 2017 COI Entry* at ¶¶ 36, 45. That approach ignores established precedent that **it is the landlord, not the tenant**, who is the utility's customer. *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, at ¶¶ 32-39; *Jonas v. Swetland Co.*, 119 Ohio St. 12, 162 N.E. 45 (1928); *Shopping Ctrs. Assn. v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 32 O.O.2d 1, 208 N.E.2d 923 (1965), and *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶9. The Relative Price Test and Safe Harbor exceptions under the third prong of the *Shroyer* Test, as adopted and applied in the Nov. 21, 2017 Order in this case, are consistent with established precedent, and are justified in those submetered arrangements where the landlord is merely passing along its costs of providing service, or where the resident has not been harmed by paying more, on an annualized basis, than if directly served by the applicable public utility.

{¶ 39} The Nov. 21, 2017 Order in this case correctly applied all three parts of the *Shroyer* Test, including the Relative Price Test and Safe Harbors, given the record here. The Complainant has failed to produce any evidence which would dispute NEP's statements that it doesn't hold any certificates of authority from this Commission or receive any of the special benefits available to public utilities. Further, the Complainant has failed to refute credible statements that the provision of utility services at Gateway Lakes, including those services provided by NEP, are limited to the Gateway Lakes apartments, and do not extend to the general public. The Complainant also does not dispute the calculation by NEP's Account Manager that during Ms. Wingo's tenancy, NEP's invoiced charges were \$11.78

less than the AEP Ohio charges for the same period and usage under the then-current default service tariff on an annualized basis using the 12 months prior to her lease expiration. Nov. 21, 2017 Order at ¶¶ 18-20, 26.

{¶ 40} Based on this analysis, the Nov. 21, 2017 Order correctly concluded that the Complainant failed to meet her burden in alleging reasonable grounds for hearing as required by R.C. 4905.26. As noted there, the Complainant has the burden of alleging that she suffered some injury in this proceeding. *Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St.3d 509, 684 N.E.2d 43, 1997-Ohio-342, citing *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189, 34 O.O.2d 347, 214 N.E.2d 666; *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1984), 14 Ohio St.3d 49, 50, 14 OBR 444, 445, 471 N.E.2d 475. Nov. 21, 2017 Order at ¶¶ 24-26. Accordingly, AEP Ohio's third ground for rehearing will be denied.

IV. ORDER

{¶ 41} It is, therefore,

{¶ 42} ORDERED, That the Complainant's application for rehearing of the Jan. 17, 2018 Entry be denied. It is, further,

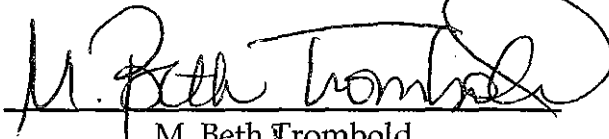
{¶ 43} ORDERED, That AEP Ohio's motion to intervene and application for rehearing of the Nov. 21, 2017 Order be granted as to such intervention, but denied in all other respects. It is, further,

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


THE PUBLIC UTILITIES COMMISSION OF OHIO



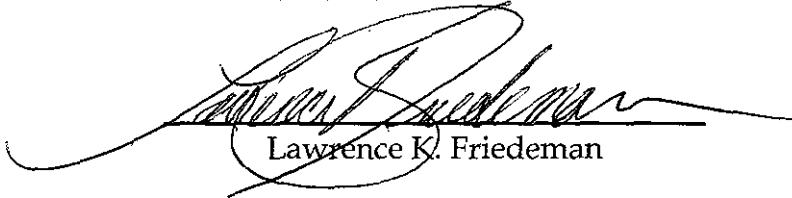
Asim Z. Haque, Chairman



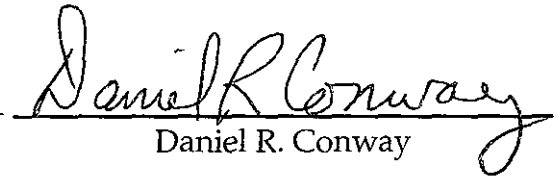
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman




Daniel R. Conway

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