Will a complaint to regulate submeters lead to the regulation of onsite distributed generation as public utilities?

June 16, 2015

Perhaps it's no surprise, but the issue of submetering in Ohio is once again in the spotlight. A recent case filed with the Public Utilities Commission of Ohio (PUCO), Mark A. Whitt v. Nationwide Energy Partners, LLC,[1] is asking that submetering companies be regulated as a public utility or as an energy marketer. If the action is successful, its consequences could extend well beyond the issue of submetering to possibly include the regulation of certain onsite distributed generation facilities.

I. A look at submetering

Submetering describes the arrangement where a landlord[2] allocates the cost of utility service to tenants or individual units through a submeter – a meter behind the utility's meter that serves the common property. In a submetering situation, the landlord remains the customer of the utility, and, in turn, provides utility services to tenants as a feature of the leasehold. But unlike the situation where the utility services are bundled in the monthly rental payment, the tenant receives a bill, just as if they were direct customers of the utility. For a variety of reasons, a landlord or other common owner can contract with a third party – the so-called "rebillers" – to undertake the management of the utility rebilling process.

II. The complaint at the PUCO

In its complaint, the plaintiff alleges that Nationwide Energy Partners LLC (NEP), a submeter company, is providing utility services to an association of condominiums without being regulated as a public utility.[3] The complaint is anchored in the plain language of various provisions of Ohio Revised Code (R.C.) Section 4905.03. This section defines the types of entities under the jurisdiction of the PUCO.[4] Specifically, the complaint alleges that NEP is an "electric light company" under R.C. 4905.03(C), a "water-works company" under R.C. 4905.03(G) and a "sewage disposal company" under R.C. 4905.03(M). These terms are defined as follows:

- An "electric light company" is a public utility "when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state . . . ." R.C. 4905.03(C).
- A "water-works company" is a public utility "when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state." R.C. 4905.03(G).
- A "sewage disposal company" is a public utility "when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state." R.C. 4905.03(M).

In each of these statutory provisions, the triggering language of public utility status is whether an entity is "engaged in the business of" supplying certain services. In Whitt, the plaintiff alleges that because NEP supplies or arranges for the supply of electric, water and sewer services to the association of condominiums as its business, NEP should be regulated by the PUCO accordingly.[5]

III. Determining public utility status

In Inscho, et al. v. Shroyer's Mobile Homes, the PUCO adopted the following three-part test to determine if a mobile home park owner, who provided water and sewer services to tenants' trailers, was operating as a public utility:[6]

1. Does the landlord avail itself of the special benefits available to public utilities (e.g. - public franchise, public right of way, or the right of eminent domain in the construction or operation of its service)?
2. Does the landlord only provide the utility service to its tenants rather than the general public?
3. Is the provision of the utility service clearly ancillary to the landlords' primary business?

Applying the test, the PUCO determined that the landlord was not a public utility. Subsequently, the PUCO has applied the Shroyer test in multiple cases when asked to determine an entity's public utility status.[7]

The Shroyer test is noteworthy because the PUCO interpreted its own jurisdiction by importing Ohio Supreme Court case law principles. See, Southern O. Power Co. v. Public Util. Comm., 110 Ohio St. 246 (1924) (To constitute a "public utility," the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately; or there must be acceptance by the utility of public franchises or calling to its aid the police power of the state.); Marano v. Gibbs, 45 Ohio St. 3d 310, (Ohio 1989) (An entity may be characterized as a public utility if the nature of its operation is a matter of public concern and membership is indiscriminately and reasonably made available to the general public). These case law principles extend beyond the plain "engaged in the business of" statutory language discussed above to determine public utility status. Under Shroyer, an entity's public utility status is determined by examining both the type of services it engages in the business of supplying and the nature of how the entity engages in the business of supplying certain services.

IV. Regulation of onsite distributed generation

In Whitt, there appear to be two potential routes for the plaintiff's complaint to be successful. The first route would involve establishing that NEP is a public utility under the Shroyer test. This approach would largely be a fact-driven analysis and would require facts that distinguish NEP from previous cases where the PUCO has determined that submeter arrangements do not constitute a public utility.

The second, and more draconian, pathway for success would be a PUCO shift from the Shroyer test. The argument for such a shift would be that the designation of public utility status, for the purpose of regulation by the PUCO,[8] must be determined by the plain language of the provisions in R.C. 4905.03. In other words, for the purpose of regulation by the PUCO, if an entity is "engaged in the business of" supplying certain services, then it is a public utility. Indeed, the dissent in the Shroyer decision made a similar argument, limiting the issue to the statutory question of "whether Respondent is 'engaged in the business of supplying water.'"[9]

Although it would represent a significant and perhaps an unlikely departure from PUCO precedent, a shift from the Shroyer test could have a ripple effect beyond submetering practices. For example, certain onsite distributed generation systems could find themselves regulated as public utilities by the PUCO. These systems have many of the same characteristics that the complainant alleges make NEP a public utility. For example, a third party solar power system on a university campus engages in the business of supplying electricity indiscriminately to multiple meters on the campus, through a distribution system that it may partly own and operate. Under the Shroyer test, these systems have not been designated as public utilities for the purpose of PUCO regulation. However, if there is a departure from the Shroyer test, these systems may quickly find themselves subject to PUCO regulation.

---

[1]Case No. 15-0697-EL-CSS, filed on April 10, 2015.

[2]The arrangement can apply to any common property ownership arrangement – in the instant case, it is the condominium association that is acting as the customer of the utility on behalf of the association's individual unit owners.

[3]Complaint at ¶ 2.

[4]R.C. 4905.02(A) defines a "public utility" to include "includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code . . . ."

[5]The specific claims of the Complaint are: Count I: Unlawful Provision of Noncompetitive Retail Electric Service; Count II: Unlawful Provision of Competitive Retail Electric Service; Count III: Violation of Certified Territory Act; and Count IV: Unlawful Provision of Water Service.

[6]Case No. 90-182-WS-CSS, et al. (February 27, 1992).

[7]See e.g., In the Matter of the Complaint of Michael E. Brooks v. The Toledo Edison Company, Case No. 94-1987-EL-CSS (May 8, 1996); In the Matter of the Complaint of Albert A. Nader, Complainant, v. Colony Square Partners, Ltd, Case No. 99-475-EL-CSS (August 26, 1999).

[8]The designation of public utility status for the purposes of PUCO regulation should be distinguished from the designation of public utility status as relevant to other provision in the Ohio Revised Code. See, McGinnis v. Quest Microwave VII, Inc., 24 Ohio App. 3d 220, 494 N.E.2d 1150, 1985 Ohio App. LEXIS 10186 (Ohio Ct. App., Wayne County 1985) (The designation of a company as a public utility by the Public Utilities Commission for purposes of regulation under R.C. Chapter 4905. is not controlling on the question whether the company is a public utility exempt from township zoning under R.C. 519.21).

[9]Dissent, at p. 2.

Authors

Dylan F. Borchers

Partner

Columbus
614.227.4914
dborchers@bricker.com