



The PUCO determines it will police the prices of submetering companies

June 27, 2017

On June 21, 2017, the Public Utilities Commission of Ohio (PUCO) issued a Second Entry on Rehearing (Entry) in its submetering case, which states that submetering companies cannot charge residential customers more for utility services than they would be charged by their local regulated utility.¹ This Entry represents the PUCO's intention to police the prices submetering companies charge residential customers.

Background

This submetering case arose out of a complaint filed against a submetering company by a condominium owner.² After this complaint case was filed, the PUCO initiated an investigation to examine the scope of its authority to regulate submetering companies and entities that perform submetering services, such as landlords and condominium associations. The PUCO traditionally has used the Shroyer Test to determine whether a landlord should be regulated as a public utility.³ The traditional three-part Shroyer Test is as follows:

- (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?

On December 7, 2016, after considering the comments of various parties, the PUCO issued a Finding and Order regarding a new test for determining if an entity is unlawfully operating as a public utility. The order clarified that the Shroyer Test applies "not just to landlords, but also condominium associations, submetering companies, and other similarly situated entities."⁴ The PUCO also clarified that a reseller will be considered a public utility if any of the three prongs of the Shroyer Test is established.⁵

In addition, the PUCO modified the third prong of the Shroyer Test by implementing a new methodology of determining whether the provision of utility service is ancillary to the submetering entity's primary business. Under the third prong of the test, the PUCO stated that there will be a rebuttable presumption that a reseller is a "public utility" if it is reselling utility service at a "threshold percentage above the total bill charges for a similarly-situated customer served by the utility's tariffed rates, an electric utility's standard service offer, or a natural gas utility's standard choice offer."⁶ The PUCO defined this as the "Relative Price Test." The PUCO sought comments regarding a reasonable threshold percentage for the Relative Price Test.

The June 21, 2017, entry

After considering numerous applications for rehearing and comments, the PUCO issued the June 21, 2017, entry, which established the following:

1. The threshold percentage of the Relative Price Test is set at zero - If a reseller sells utility service at a price that exceeds amount the local utility would have charged the customer, there will be a rebuttable presumption that the reseller is acting as a public utility. This would invoke PUCO jurisdiction over the reseller's activities.
2. The Safe Harbor Provision - If the rebuttable presumption is triggered, the reseller can avoid PUCO jurisdiction if it falls within the Safe Harbor. A reseller falls within the Safe Harbor provision if (1) the reseller is simply passing through its annual costs of providing a utility service charged by a local public utility and competitive retail service provider (if applicable) to its submetered residents; or (2) 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.
3. The Relative Price Test does not apply to commercial and industrial customers. However, the PUCO indicated that it will apply the traditional Shroyer Test to commercial and industrial customers on a case-by-case basis.
4. The PUCO clarified that the December 7, 2016, order does not apply to behind-the-meter distributed generation.
5. To facilitate potential submetering complaints, the PUCO directed all public utilities to work with PUCO staff to develop a website tool or other mechanism to provide submetered residential customers with an estimated calculation of what they would have paid the local public utility for equivalent usage under the utility's default service tariffs.

Conclusion

The June 21, 2017 Entry is yet another chapter in the ongoing submetering controversy. The Entry establishes the PUCO's clear intent to prevent submetering companies from charging residential customers more for utility service than they would be charged by their local regulated utility. It also helps define the scope of the PUCO's modification the Shroyer Test. However, some parties may continue to challenge the Entry and may potentially appeal the PUCO's decision to the Ohio Supreme Court.

¹ *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Second Entry on Rehearing (June 21, 2017).

² See "[Will a complaint to regulate submeters lead to the regulation of onsite distributed generation as public utilities?](#)"

³ *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992).

⁴ December 7, 2016, Order at 8 (the PUCO defined any entity reselling utility service as a "Reseller").

⁵ *Id.* at 10-11.

⁶ *Id.* at 9.

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