

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Michael E.)
Brooks, et al.,)

Complainants,)

v.)

Case No. 94-1987-EL-CSS

The Toledo Edison Company,)

Respondent.)

OPINION AND ORDER

The Commission, having considered the testimony and exhibits presented at the hearing in this case, the pleadings filed by the parties, the applicable law and evidence of record, and being otherwise fully advised, hereby issues its Opinion and Order.

APPEARANCES:

George R. Smith, Jr., 1203 $\frac{1}{2}$ Adams Street, Toledo, Ohio 43624, on behalf of the complainants.

Michael C. Regulinsky, Centerior Energy Corporation, 6200 Oak Tree Boulevard, Independence, Ohio 44131, on behalf of the Toledo Edison Company, respondent.

Bell, Royer, and Sanders Co., L.P.A., by Barth E. Royer, 33 South Grant Street, Columbus, Ohio 43215-3927, on behalf of Simon Property Group, L.P., dba Simon Real Property Group, L.P.

Betty D. Montgomery, Attorney General of the State of Ohio, by Gerald A. Rocco, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215-3793, on behalf of the staff of the Public Utilities Commission of Ohio.

SUMMARY OF THE PROCEEDINGS:

On December 15, 1994, Michael E. Brooks and Raoul J. Sartori, shareholders of Sarbrook, Inc., dba Little Caesar's Pizza (Sarbrook); Perfect Playhouse, Inc. (Perfect Playhouse); Darryl's Famous Homemade Ice Cream Factory, Inc. (Darryl's); and Laurence Mitchell filed this complaint pursuant to Section 4905.26, Revised Code, against Toledo Edison Company (Toledo Edison or the company), Simon Property Group, Inc.

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(Simon)¹, New Towne Mall Company, and S-S-C Company (SSC). Each complainant, except Mitchell, was a tenant at the North Towne Square Mall (North Towne or mall) in Toledo, Ohio. Mitchell, a guarantor of Darryl's lease with Simon, also operated a second Darryl's store at the Southwyck Shopping Center (Southwyck) in Toledo under a lease agreement with SSC. The complaint generally alleges that Simon and SSC resold or redistributed electrical service to their respective tenants in violation of Toledo Edison's tariff P.U.C.O. No. 7, Paragraph 19(1)²; and that as a result of the company's failure to enforce its tariff, the landlords have been permitted to resell electricity at unjust, discriminatory, and unreasonable rates, and to operate as unregulated public utilities in violation of Sections 4905.22, 4905.30, and 4905.32, Revised Code.

On January 27, 1995, SSC moved to dismiss the complaint. Toledo Edison and Simon filed similar motions on January 30, 1995. In addition, Simon filed a motion for sanctions against complainants' counsel on the grounds that the issue of whether Simon has operated as a public utility was squarely decided in the Commission's September 17, 1992 Entry in *Toledo Premium Yogurt, Inc., dba Freshens Yogurt, v. Toledo Edison Company, et al.*, Case No. 91-1528-EL-CSS (appeal dismissed, *Toledo Premium Yogurt, Inc. v. Pub. Util. Comm.*, 66 Ohio St. 3d 1465 [1993]) (hereinafter *Freshens*).

By entry issued March 16, 1995, the Commission dismissed the mall owners as respondents in finding that the landlords were not public utilities subject to Commission jurisdiction. Although Simon and SSC were dismissed as respondents, the Commission encouraged the landlords to participate in the development of the record and issues in this case. The Commission also found that the complainants had stated reasonable grounds for their complaint, and denied the motions to dismiss and Simon's motion for sanctions. The entry also scheduled a prehearing conference which was held on April 11, 1995.

On April 14, 1995, the complainants filed an application for rehearing, which was denied by the Commission's entry of May 4, 1995. The entry on rehearing also scheduled a hearing for September 12, 1995, directed the parties to prefile expert direct testimony, and ordered that notice of the hearing be published in accordance with Section 4905.26, Revised Code. Finally, the Commission directed its staff to intervene as a party in this case to provide testimony with respect to the policy issues and potential impact upon other jurisdictional utilities.

On July 28, 1995, Simon Property Group, Inc. and Simon Property Group, L.P., dba Simon Real Property Group, L.P., filed a motion to intervene which was granted by en-

¹ Although the complaint named Simon Property Group, Inc. and New Towne Mall Company as respondents, the North Towne Square Mall is now owned by Simon Property Group, L.P., dba Simon Real Property Group, L.P., a Delaware limited partnership and the successor in interest to the New Towne Mall Company. Simon Property Group, Inc., a Maryland corporation and general partner of Simon Property Group, L.P., operates the mall. The former and current owners and operators of the mall are hereafter collectively referred to as Simon.

² Hereinafter referred to as Toledo Edison's resale tariff provision.

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try issued September 6, 1995. SSC chose not to intervene, but did provide evidence through discovery. Notice of hearing was published in accordance with Section 4905.26, Revised Code, and proof of publication was filed September 1, 1995.

At the request of the parties, the hearing of this case was called and continued to October 10, 1995; and subsequently rescheduled a second time at the complainants' request. On November 1, 1995, the direct written testimony of expert witnesses Linda B. Hagadone, director of redistribution for Simon; John P. Wack, manager of rates and contract administration for Centerior Service Company; and Robert B. Fortney, public utilities administrator with the Commission's staff was docketed in accordance with the Attorney Examiner's entry issued October 4, 1995.

On November 8, 1995, the hearing was held at the Commission before Attorney Examiner Richard M. Bulgrin. Michael E. Brooks, president of Sarbrook; Darla D. Hamstreet, secretary and director of Perfect Playhouse; and Laurence Mitchell, sole owner and manager of Darryl's, testified on behalf of the complainants. Ms. Hagadone, Mr. Wack, and Mr. Fortney testified on behalf of Simon, Toledo Edison, and the Commission's staff, respectively. Following the hearing, the record of this proceeding was held open to receive Toledo Edison Exhibit No. 3 relating to the proposed tariff amendment filed under Case No. 94-1631-EL-ATA, Complainants' Exhibit No. 29 relating to certain stipulations of fact filed in the *Freshens* case, and complainants' motion to strike certain portions of Ms. Hagadone's testimony. Counsel for complainants also indicated he had prepared a prehearing brief which was docketed on November 9, 1995.

On November 17, 1995, Toledo Edison filed a motion to dismiss the complaint as to the alleged tariff violations by SSC on the grounds that complainants' prehearing brief stated that complainants would not request the Commission to find a tariff violation with respect to SSC's electrical billing practices. However, complainants filed a memorandum opposing such dismissal on November 29, 1995.

On November 20, 1995, complainants docketed their Exhibit No. 29 and motion to strike. Toledo Edison and Simon filed their initial briefs on December 18, 1995, and Toledo Edison filed its Exhibit No. 3 on December 20, 1995. Complainants and Simon filed reply briefs on December 29, 1995.

SUMMARY OF THE EVIDENCE:

Paragraph 19(I) of Toledo Edison's tariff prohibits the resale of electricity provided by the company except, *inter alia*, "[w]here the landlord furnishes electricity as part of the consideration for the total rent charged and there is no metering, check metering, checking, measuring, estimating, calculating, apportionment or limitation of use thereof, or separate or identifiable charge therefor."³

³ On October 11, 1994, Toledo Edison filed an application in Case No. 94-1631-EL-ATA to amend this tariff provision by permitting certain customers to redistribute or submeter electrical service under specified conditions; however, no ruling has been issued on the application.

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Michael Brooks, president of Sarbrook, testified that he believes Simon's billing practices for electrical service at North Towne violated this tariff provision, and that he was overcharged for the electricity used by Sarbrook in operating the Little Caesar's franchise at North Towne from December 1990 until February 1995. According to his testimony and the complainants' exhibits of bills and correspondence he received from Simon, the electrical charge at Sarbrook's North Towne store ranged from approximately \$1,500 to \$1,900 per month and frequently fluctuated without any apparent reason. Mr. Brooks stated that he operates four other Little Caesar's franchises in the Toledo area, and the electrical charge at North Towne was much higher than at his other stores. On cross-examination, he admitted that some of the equipment at his North Towne store was different from that used at Sarbrook's other franchise locations; and that after a conversation with Simon's representative, Simon adjusted the electrical charge to bring his North Towne bill more in line with the electrical charge at his other stores. He also acknowledged that he had an attorney review Simon's lease agreement before renting the North Towne store (Tr. 10-11, 16, 18, 23-26, 30, 34-36).

Ms. Hamstreet testified that Perfect Playhouse was a tenant at North Towne from August 1989 until February 1995. She said that before Perfect Playhouse began operations, the former North Towne manager told her SHE could expect an electric bill of \$400 to \$600 per month. Subsequently, however, Simon determined her electrical charge to be more than \$1,100 per month, and thereafter her electrical charge was adjusted numerous times ranging from a low of approximately \$800 to a high of \$1,165 per month. On cross-examination, the witness stated that she felt that Perfect Playhouse's electric bills were wrong, but she had no way of verifying how much electricity was actually used. She had initially assumed that Perfect Playhouse would be a customer of Toledo Edison and billed directly, although she admitted that an attorney had reviewed Simon's lease agreement before Perfect Playhouse rented the store. She also felt that Simon indiscriminately changed their electrical charge, although she also stated that a Simon representative had visited their store and reviewed Perfect Playhouse's electrical equipment (Comp. Ex. 12; Tr. 57-60, 78, 80, 91, 98, 102-03).

Mr. Mitchell testified that Darryl's operated a store at North Towne from December 1992 through November 1994, and another at Southwyck from May 1993 until October 1994. His testimony indicated that he understood Simon's method of determining the electrical charge at his North Towne store, but he asserted that the Simon's charges were not actually based on anything. He stated that in March 1994, Simon reduced his electrical charge from \$394 to \$294 shortly after he had complained about his bill, and he felt that such adjustment was made solely as a result of his complaint rather than on the basis of any empirical data. On cross-examination, Mr. Mitchell insisted that Simon never conducted a field audit of his store and equipment because his employees would have informed him of such an event; but he later conceded it may have been possible that Simon could have contacted his store without his knowledge (Tr. 108, 110, 117-18, 126-32, 141-42).

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With respect to Darryl's Southwyck store, Mr. Mitchell admitted that he was charged a fixed amount of \$524 per month throughout the period of his tenancy, and he acknowledged that his lease agreement with SSC stated such charge as a fixed annual amount. But he also stated that it was his understanding that SSC would install a meter and rebill him based on his actual usage notwithstanding the fixed amount specified in the lease agreement. He testified that SSC did actually install a meter, but continued to bill him for the fixed charge under the lease agreement although SSC apparently did track the difference between the metered and paid amounts (Tr. 121-22, 125, 142-44, 149-50).

According to Ms. Hagadone's prefiled testimony, Simon, headquartered in Indianapolis, Indiana, is one the country's largest developers and managers of commercial rental properties, and currently administers lease arrangements for over 150 retail properties, including 76 enclosed shopping malls, nationwide. North Towne, which opened in 1980, is an enclosed mall with space for approximately 100 tenants, including three major department stores. The mall provides its tenants with a number of services, such as parking, security, trash removal and water, in addition to electrical service, although the three anchor stores are directly supplied by Toledo Edison (Simon Ex. 1, at 1-3, 9).

At 57 of Simon's enclosed malls, including North Towne, non-anchor tenants are provided electrical service through the mall's internal distribution system, rather than the local electric utility. This practice is economically advantageous for the local utility since the mall bears the capital costs of the distribution system, and the utility's costs for tenant meters is eliminated. In addition, the utility's operating expenses, such as meter reading and billing, are greatly reduced as are the costs associated with initiation and termination of service, or store reconfigurations due to tenant changes. Furthermore, the aggregation of diverse tenant demand with the mall's own usage should create a better load factor, thereby reducing the per unit capacity costs relative to serving each tenant individually. Finally, the witness asserts, this practice is beneficial for both the mall and tenants since the aggregated mall service is generally eligible for utility lower rates, and an automated demand-side management system substantially reduces energy demand and consumption by controlling space conditioning and lighting, which also prolongs the life of tenant appliances on affected circuits (*Id.* at 8-12)⁴.

According to Ms. Hagadone, individual tenant space is submetered, where permitted by law, at 13 of the 57 Simon-managed enclosed malls which provide electrical service; and in those locations, the tenant is charged for actual usage at the most favorable rate for which the tenant would be eligible if the tenant was served by the local utility. At the remaining 44 malls, such as North Towne where Toledo Edison's tariff expressly prohibits submetering, the tenant is charged an electrical service component as part of the total rental charge under the lease agreement. The lease specifies that the electrical charge is payable in advance as additional rent, and based on Simon's determination of the tenant's consumption of electricity at the same cost as the tenant would

⁴ The witness testified that the estimated power reduction attributable to the demand-side management system installed at North Towne was 5.62 percent in 1994 (Tr. 165-66, 168).

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be charged by the local utility which would otherwise furnish such service, but in no event at a cost less than Simon's cost of providing electrical service.⁵ However, Ms. Hagadone asserts, the electrical charge charged to the tenant under the lease does not represent a bill or charge for electricity purchased by the mall and resold to the tenant, nor an allocation of the metered amount or cost of electricity actually consumed by the tenant, nor an estimate of the tenant's actual usage in any particular month (*Id.* at 7, 13-15).

As explained by the witness, the disparity in the electrical requirements of mall tenants prevents Simon from applying a surcharge based on square footage to compensate for the electricity used by each tenant. Instead, Simon develops a tenant-specific electric service component which is included in the rental payment and paid in advance of the rental month. Simon's determination of the tenant's consumption of electricity begins with the development of the tenant's preliminary demand and energy profile based upon the tenant's electrical equipment, square footage, typical-year local weather data, and historical experience with similar tenants. Simon then computes the average monthly charge which the tenant would pay if served directly by the local utility using the utility's most advantageous rate for which the tenant would qualify. Simon notifies the tenant that this charge is adopted as an interim electric service component which will be adjusted retroactively after field-verified data becomes available. Simon then employs a consultant to conduct an audit of the tenant's store to identify such factors as hours of operation, lighting facilities, and all electrical appliances to determine the nameplate rating and electrical characteristics of the tenant's connected electrical load. Using this field-verified data, Simon determines a more accurate demand and energy profile for the tenant, and calculates a new average monthly charge based on the local utility's most advantageous rate, which becomes the tenant's electric service component. The tenant is then billed or credited for the cumulative difference between the interim and new electric service component. The new component is a fixed monthly amount, but is subject to adjustments to reflect changes in the applicable rate of the local utility, changes in the tenant's operations or appliances, or technological changes which effect the assumptions used to develop demand and energy profiles (*Id.* at 14, 17-23).

To test the validity of its electric service component calculations, Simon also periodically performs "metered-to-calculated" comparisons of the mall's total actual consumption adjusted for weather and internal use, and the total tenant consumption calculated using the above-described method. Simon also permits tenants to install their own meters and if the metered-to-calculated difference exceeds five percent, Simon will adjust the tenants charges and share in the cost of such installation. Calculations included in Ms. Hagadone's testimony show that the metered-to-calculated difference at North Towne from 1986 through 1994 was about four percent (*Id.* at 24-35).

⁵ Simon's lease agreements with Brooks, Perfect Playhouse, and Darryl's each contain this standard provision. Darryl's lease contains an additional clause giving the tenant the right, subject to applicable law and local utility regulations, to install separate meters to measure tenant consumption (*Id.* at 7-8).

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With respect to the complainants in this proceeding, Ms. Hagadone stated that Simon's records show that Mr. Brooks did contact Simon regarding his electrical charge and, as a result of their conversation, Simon determined that Sarbrook had different equipment and operating hours than the previous Little Caesar's franchisee at North Towne. Accordingly, his demand and energy profile were adjusted and he was issued a credit for more than \$5,400. She also testified that Simon has no record of either Perfect Playhouse or Darryl's ever contacting Simon's Redistribution Management Department with their complaints, as instructed on the tenants' monthly invoices, although the lease agreements of both Perfect Playhouse and Darryl's were renegotiated during their respective tenancies. Ms. Hagadone did acknowledge that these tenants may have complained about their electrical charge directly to the North Towne manager, but if so, their complaints were never forwarded to her department. The witness also stated that Simon's records show that their consultant did perform a field survey of Darryl's North Towne store and spoke with an employee there on September 1, 1993 (*Id.* at 35-38, Tr. 163-64, 281-82).

On cross-examination, Ms. Hagadone stated that she did have personal knowledge of the discussions between Simon and Toledo Edison regarding electrical service arrangements prior to the construction of North Towne, and that Simon was aware of Toledo Edison's resale tariff provision. In response to a question from the bench, she testified that even if this Commission were to determine that Toledo Edison's prohibition against submetering at the mall was void, Simon would not submeter North Towne tenants due to the expense of installing meters in existing facilities, but may consider submetering if a new mall were constructed. She also indicated that Simon reviews its tenants' electric service components on an annual basis (Tr. 183-89, 195-96, 203).

According to the testimony of Toledo Edison witness Wack, North Towne and Southwyck are electric load centers as defined by the Ohio Electric Suppliers Certified Territory Act in Section 4933.81(E), Revised Code. As such, Toledo Edison's obligation to provide electric service extends only to the landlords, not their tenants. The witness asserts that the provision of electrical service to the tenants is governed by the lease agreements of the parties which, in Mr. Wack's view, essentially provide that the tenants will pay the same electric costs as they would have paid had they been supplied directly by Toledo Edison (Toledo Edison Ex. 2, at 1-2; Tr. 207-08).

With respect to Toledo Edison's resale tariff provision, Mr. Wack traced paragraph 19(I) back to 1963 and explained that at that time, there were no enclosed malls within Toledo Edison service territory. Instead, the resale prohibition was aimed at office and apartment buildings where tenant usage was virtually uniform and the cost of electricity could be easily incorporated in the rental payment. Subsequently, however, the development of malls and electrical appliances has led to greater disparities among tenant usage, and business owners now require separate electric charges to identify one of their costs of doing business. Therefore, Toledo Edison believes that it is reasonable

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for a mall to separately identify the electric service component of a tenant's rent (Toledo Edison Ex. 2, at 2-4).

Mr. Wack asserts that Toledo Edison has an indirect interest in ensuring that mall tenants are charged for electricity at the same rates they would pay had the tenants been customers of Toledo Edison. On cross examination, Mr. Wack stated that this indirect interest is attributable to the public's perception that all electrical service is provided by Toledo Edison and the company does not want people to conclude that Toledo Edison is overcharging for such service (Toledo Edison Ex. 2, at 4-6; Tr. 216-217).

Mr. Wack clearly stated that SSC violated Toledo Edison's existing resale tariff provision by submetering its tenants at Southwyck, but on cross-examination he appeared uncertain as to whether or not North Towne's practices also violated the tariff. He did, however, conclude that both landlords' practices were reasonable and consistent with the intent of Toledo Edison's prohibition against resale or redistribution; and that the tenants were not damaged by such practices because they paid substantially the same costs for electrical service as they would have paid had they been served by Toledo Edison. On cross-examination, however, Mr. Wack admitted that Toledo Edison's comparisons of the complainants' costs paid to Simon versus Toledo Edison direct service was limited to application of the proper Toledo Edison rates and relied on the usage estimates developed by Simon (Toledo Edison Ex. 2, at 5-8; Tr. 224-28, 247-51, 256-57).

Finally, with respect to Toledo Edison's enforcement of the resale/redistribution prohibition, Mr. Wack asserts in his prefiled testimony that this Commission should not be involved in analyzing mall billing arrangements; but on cross-examination, he suggested that Toledo Edison would seek Commission approval and involvement in enforcing this tariff provision (Toledo Edison Ex. 2, at 7; Tr. 231-41).

The Commission's staff took no position on the issues raised in this case. Staff witness Fortney's testimony was limited to proposing an escrow procedure whereby tenants can avoid disconnection in the event a landlord defaults on its payment to the utility, and providing copies of the resale or redistribution prohibition provisions for the eight jurisdictional electric utilities (Staff Ex. 1).

PENDING PROCEDURAL MOTIONS:

As a preliminary matter, we note that prior to his cross-examination of Ms. Hagadone, complainants' counsel indicated that he had not been available to receive and review the witness's prefiled testimony, but refused several opportunities to review her testimony before conducting his cross-examination.⁶ Instead he moved to strike all portions of her testimony relating to Simon's electrical service billing practices as being reasonable or consistent with Toledo Edison's resale tariff provision, and any portions

⁶ Although Simon's counsel sent Ms. Hagadone's testimony to Mr. Smith by overnight delivery one week before the hearing, Mr. Smith was not at his office to receive it the following day and apparently took no steps to obtain it or notify opposing counsel that he had not received it (Tr. 167-68).

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relating to harm to tenants resulting from such practices. The attorney examiner denied the motion, but indicated complainants' could renew such motion in their brief (Tr. 174, 177-78). After the hearing, complainants renewed their motion by filing a separate motion to strike.

Complainants' sole basis for their motion is that the scope of this proceeding should be limited to the issue of whether the landlords' electrical service billing practices constitute a violation of Toledo Edison's resale tariff provision. They argue that various portions of Ms. Hagadone's testimony are simply irrelevant to the determination of this issue. We do not agree and deny such motion accordingly. We find this witness's testimony to be very relevant in understanding the extremely complex method Simon uses to recover its costs in providing its tenants with electrical service.

We also note that subsequent to the hearing, Toledo Edison filed a motion to dismiss the complaint as to the alleged tariff violations by SSC on the grounds that complainant's prehearing brief stated that complainants would not request the Commission to find a tariff violation with respect to SSC's electrical billing practices. However, complainants subsequently filed a memorandum opposing such dismissal. Complainants state that their prehearing brief did not anticipate the admission of SSC records as evidence to support their claim against SSC, and that the record of this proceeding does contain sufficient evidence to support such a finding. As complainants are now apparently asking this Commission to consider SSC's alleged tariff violation, Toledo Edison's motion to dismiss is denied.

ANALYSIS OF THE ISSUES:

This case, as well as its predecessor, the *Freshens* case, appears to have arisen out of civil actions by the landlords to collect back rent. In response, the tenants filed their complaints with this Commission, alleging that the landlords are operating as public utilities and that the landlords' electrical service billing practices constitute a violation of Toledo Edison's resale tariff provision.

In *Inscho, et al. v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al. (February 27, 1992), (hereinafter *Shroyer*), the Commission 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:

- (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?

However, in noting the pervasive practice of Ohio landlords in providing utility services to tenants, the *Shroyer* opinion notes that this Commission has "neither the staff nor the statutory authority to insert ourselves into the landlord-tenant relationship as long as the landlord's actions are consistent with the tariffs of the regulated utility from which the service is obtained." *Shroyer, supra*, at 5 (emphasis added). In both *Freshens* and the instant case, complainants rely on this phrase in contending that where a landlord's utility billing practice is inconsistent with the supplying utility's tariff, the Commission must assert jurisdiction and regulate such practice.

In *Freshens*, we concluded that Simon was not operating as a public utility and dismissed the landlord as a respondent, but scheduled the case for hearing on the issue of whether Simon's electric service billing practices constituted a violation of Toledo Edison's resale tariff provision. However, the parties settled their dispute immediately prior to the hearing, and no final determination of the issue was reached.

In our March 16, 1995 Entry in this case, we again applied the *Shroyer* test in determining that Simon and SSC were not operating as public utilities, but retained jurisdiction to consider the existence and consequences of the alleged tariff violations. We also identified the following issues for the parties to address:

What duty, if any, does Toledo Edison have to serve the complainants given our finding that the landlords are not public utilities under the *Shroyer* criteria?

If Toledo Edison has no duty to serve the landlords' tenants, are the company's tariff provisions prohibiting resale or redistribution unreasonable and unenforceable?

Are the prohibitions against resale or redistribution in Toledo Edison's tariff intended to protect the interests of the complainants, the company, or both?

Assuming the complainants prove a tariff violation, what remedies or sanctions are appropriate and available to this Commission and the parties?

Complainants' Position:

In their briefs, complainants cite *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 208 N.E.2d 923, 59 P.U.R.3d 403, 32 O.O.2d 1 (1965), for the proposition that this Commission has the jurisdiction and duty to regulate the resale of electric energy to third persons; and they contend that the sole issue to be determined by the Commission

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in this case is whether the landlords' electrical service billing practices constitute a violation of Toledo Edison's resale tariff provision, notwithstanding the validity or reasonableness of such provision or such practices. Complainants seek a finding of a violation by this Commission as a jurisdictional prerequisite to maintaining an action for treble damages under Section 4905.61, Revised Code, presumably in the common pleas court where the parties are currently embroiled in litigation.⁷

Complainants do not assert that Toledo Edison has a duty to serve North Towne or Southwyck tenants. Instead, they cite *Ten Ten Lincoln Place v. Consolidated Edison Co.*, 73 N.Y.S. 2d 2, 7 (1947), and *Penna R.R. Co. v. International Coal Co.*, 230 U.S. 184, 197 (1913), for the propositions that a tariff which has been filed and approved by the Commission is presumed to be reasonable, and is to be treated as a statute which is binding upon both the utility and its customers. They contend that Toledo Edison's tariff, having been approved by this Commission, carries the force and effect of law. Therefore, complainants argue, the reasonableness or enforceability of the tariff is irrelevant. They assert that Toledo Edison's resale tariff provision was obviously intended to protect tenants, and that the only remedy required in this case is a finding by this Commission that the landlords violated the tariff.

Simon's Position:

Simon asserts that its practices do not violate Toledo Edison's resale tariff provision, since Simon's electrical service charges are not based on the tenant's actual usage. Simon contends that the provision does not prohibit a landlord from redistributing electricity and assessing charges for electrical service to its tenants. Rather, Simon argues, the tariff only prohibits the metering, estimating, calculating, apportionment or limitation of the tenant's actual use of electricity, or making a separate or identifiable charge for such actual use. The landlord notes that the uncontroverted testimony of Ms. Hagadone clearly demonstrates that Simon's determination of the electrical service component of a tenant's lease payment is not based upon the tenant's actual usage at North Towne. Instead, as explained by Ms. Hagadone, the component represents a projected average cost based upon the tenant's electrical equipment, square footage and hours of operation, the supplying utility's fuel cost, and normalized weather factors.

Ms. Hagadone also testified that the general understanding within the commercial property industry is that resale prohibitions, such as Toledo Edison's, implicitly apply only to resale or redistribution of actual tenant usage. In addition, Simon claims that Toledo Edison's resale tariff provision can only be construed to prohibit the resale of a tenant's actual usage. Otherwise, Simon contends, Toledo Edison's tariff would prohibit a landlord from ever receiving any compensation for electrical service provided to tenants. Although the complainants assert that a landlord could simply calcu-

⁷ Complainants, however, have presented no evidence in this proceeding to quantify such damages, whereas Toledo Edison and Simon presented evidence which indicates that the complainants paid substantially the same amounts for electrical service as they would have had they been served directly by Toledo Edison.

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late a fixed amount to be included in the total rent, Simon argues that such method inherently involves estimating a tenant's actual usage in some fashion.

In addressing the issues raised by this Commission, Simon contends that under the Ohio Electrical Suppliers Certified Territory Act, Sections 4933.81-4933.90, Revised Code, (Certified Territory Act), North Towne is an "electric load center" which Toledo Edison has neither the obligation nor right to serve. Simon further asserts that the company's resale tariff provision is not unreasonable or unenforceable as long as it is construed in a manner consistent with Toledo Edison's legitimate interest in limiting the use of electricity beyond delivery to a customer's meter. In support of this contention, Simon notes the company's public relations interest identified by Mr. Wack.⁸ The landlord also points out that Toledo Edison's resale tariff provision predates the Certified Territory Act, and argues that this prohibition was intended to prevent a Toledo Edison customer from competing with the company.

Further, Simon argues that Toledo Edison's resale tariff provision was solely intended to protect the interest of the company, and does not create any third-party rights for tenants. Simon contends that the tariff only applies to Toledo Edison customers, while landlord-tenant relationships are governed by lease agreements, not the utility's tariff. In addition, Simon notes that the only remedy specified in the tariff, termination of power to the mall, is solely within Toledo Edison's discretion to exercise. Moreover, Simon argues, there is no reason to believe that the elimination of an identified electrical service component within a tenant's total rental amount would produce any benefit to the tenant, particularly in light of the complainants' admissions that businesses need to be able to identify their costs of operation. Simon notes that each of the complainants' witnesses admitted that they did not object to, nor were damaged as a result of, their electrical service being separately identified as a component of their total monthly rent (Tr. 39-41, 81, 151).

Finally, Simon asserts that, assuming a tariff violation exists, the only remedy available to the Commission and parties is the remedy specified in Toledo Edison's resale tariff provision, namely disconnection of electrical service to North Towne, a remedy which the company is not obligated to exercise.

Toledo Edison's Position:

On its own behalf, Toledo Edison first contends that it would be unreasonable and unlawful for this Commission to make any determination which would result in a Commission sanction or treble damage award under Section 4905.61, Revised Code, against the company given the facts of this case.

⁸ The company maintains that the general public erroneously assumes that all electrical service within the Toledo Edison service territory is provided by the company; thus, the company has an interest in ensuring that all electrical service charges within its territory are reasonable and accurate.

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With respect to the Commission-raised issues, Toledo Edison also argues that under the Certified Territory Act, the company has neither the duty nor legal right to serve either North Towne or Southwyck tenants. The company also contends that its resale tariff provision was intended to protect Toledo Edison's interests by ensuring that redistributed electricity is not resold to the general public. The company notes that the provision dates back to 1963, at a time in which office space and residential apartments exhibited minimal differences in demand or usage. Subsequently, however, commercial real estate and tenant electrical usage have changed dramatically; and the company argues that Simon's and SSC's practices are reasonable because they avoid tenant cross-subsidies, allow tenants to identify the electrical costs of their respective businesses, and are consistent with the tariff's purpose of eliminating situations where Toledo Edison would be competing with its own customers.

In addition, the company asserts that there is a public perception that Toledo Edison provides all electrical service within the Toledo Edison service territory. Thus, the company argues, the resale prohibition protects a valid Toledo Edison interest in that any resales in which tenants are overcharged for electricity will negatively impact the company's public image. Finally, Toledo Edison urges the Commission not to become involved in lease disputes, and claims that no sanctions or remedies are appropriate in this case since the tenants have not suffered any harm.

DISCUSSION:

After reviewing the evidence of record and arguments of the parties, we conclude that Toledo Edison has no valid right or interest in prohibiting or restricting electric service and related billing practices as they apply to the resale or redistribution of electrical service from a landlord to a tenant where the landlord is not operating as a public utility, and the landlord owns the property upon which such resale or redistribution takes place. Accordingly, we find that Toledo Edison's resale tariff provision, which purports to prohibit such practices, void to that extent.

The complainants cite *Shopping Centers, supra*, for the proposition that this Commission must assert jurisdiction over a landlord's resale or redistribution of electricity to a tenant where the supplying public utility's tariff prohibits such resale or redistribution. Assuming, *arguendo*, that Toledo Edison's resale tariff provision applies to all redistribution/resale situations, such tariff provision does not, by itself, extend this Commission's jurisdiction beyond the regulation of the relationship between a public utility and its customer.

In *Shopping Centers*, Cleveland Electric Illuminating Company (CEI) filed an application to amend its tariff to prohibit redistribution or submetering at shopping centers. The Shopping Centers Association of Northern Ohio intervened and argued that the new tariff would adversely effect their operations. The Commission, however, concluded that the tariff amendment governed sales of electric energy for resale and that the PUCO had no jurisdiction to regulate such sales for resale to third persons. On appeal by the association, the court held that shopping centers were CEI customers,

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notwithstanding any subsequent resale of electricity to tenants; and that the Commission's jurisdiction did extend to CEI's tariff provisions which affected CEI customers. Syllabus 2 of the court's opinion states:

Within the provisions and meaning of Section 4905.03(A)(4), Revised Code, the term, 'consumer,' used in reference to an Ohio public utility supplying electric energy, includes an Ohio resident receiving and paying for the electric energy furnished him by such public utility, and the fact that such 'consumer' resells through submetering a part of such electric energy to others connected with him as lessees, tenants or in other business relationships does not thereby remove the public utility from its character as such, and it is amenable to supervision, regulation and control by the Public Utilities Commission of Ohio. And where the 'consumer' complains of a regulation proposed by the utility covering the furnishing of electric energy which will adversely affect him and which he claims will discriminate against him, the Commission must assume and exercise jurisdiction as provided in Section 4905.04 *et seq.*, Revised Code.

Id., at 3 Ohio St.2d 1-2, 208 N.E 2d 924.

In applying the holding in *Shopping Centers* to the instant case, we find that Simon and SSC are "consumers" within the meaning of Section 4905.03(A)(4), Revised Code; and this Commission must assume and exercise jurisdiction with respect to the application and validity of Paragraph 19(I) of Toledo Edison's tariff P.U.C.O. No. 7 upon Simon and SSC, as Toledo Edison customers. In this regard, we find the company's resale tariff provision to be unreasonable and unenforceable for the reasons stated herein, and we will direct Toledo Edison to delete or modify such provision in accordance with this opinion. *Shopping Centers* does not, however, require this Commission to take the further step of attempting to regulate arrangements between non-utility landlords, such as Simon and SSC, and the landlords' tenants, as urged by complainants.

We believe our decision in this case is entirely consistent with the court's opinion in *Shopping Centers*. As noted in our prior entries in *Freshens* and the case at bar, this Commission's jurisdiction extends to the regulation of Toledo Edison and its relationships with its customers, Simon and SSC. Our jurisdiction is not, however, extended beyond the public utility/customer relationship merely by the inclusion of a provision in the utility's tariff which seeks to reach beyond such relationship. To conclude otherwise would mean that the Commission's jurisdiction may be controlled by the very utilities this Commission is charged with regulating, rather than Ohio statute.

With respect to complainants' argument that Toledo Edison's resale tariff provision should be given the force and effect of statute, we first note that neither the parties nor this Commission have been able to identify any instance in which the validity of this tariff provision has been challenged. Rather, it appears from the record that this provision was originally included in the company's tariffs prior to the Certified Territory Act to prevent competition from the company's own customers, and was subsequently incorporated without comment or scrutiny in numerous tariff revisions. We can not agree, therefore, that this Commission is now foreclosed from considering the reasonableness and validity of this provision under the present circumstances.

As a practical matter, this Commission is ill-equipped to insert itself as an arbiter of landlord/tenant disputes given our limited resources and statutorily-restricted enforcement powers. See, *Ohio Mfrs. Ass'n v. Pub. Util. Comm.*, 46 Ohio St.2d 214, 346 N.E.2d 770, 75 O.O.2d 245 (1976). Moreover, Sections 5321.04(A)(6) and 3733.11(B), Revised Code, currently protect tenants against abuses related to landlord-provided utility service.⁹

In addition, we conclude that Toledo Edison is also ill-suited to enforce its resale tariff provision, notwithstanding the company's assertions to the contrary. The testimony of company witness Wack demonstrates that in the case at bar, Toledo Edison is unable to state with absolute certainty that the complainant tenants paid no more for electrical service at North Towne than if they had been served directly by the company, due to the fact that the tenants' actual usages were never metered.¹⁰ Furthermore, the company offered no evidence that it currently monitors, or is even capable of monitoring, all similar landlord-tenant arrangements within the Toledo Edison service territory. Moreover, despite Mr. Wack's assertions that the resale tariff provision is necessary to protect Toledo Edison's interests, and that the Commission should not involve itself in landlord-tenant disputes, he also testified that the company would not enforce its tariff by disconnecting a landlord without first seeking Commission intervention and approval. Clearly, Toledo Edison can not readily detect a violation or enforce this provision, nor has the company demonstrated adequate justification for the provision's continued application in circumstances such as those presented in this case.

⁹ Section 5321.04 (A)(6), Revised Code, provides that a landlord shall supply running water reasonable amounts of hot water, and reasonable heat at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection. Section 3733.11(B), Revised Code, requires a mobile home park operator to fully disclose in writing any utility service charges prior to a tenant or owner executing a rental agreement and assuming occupancy; prevents the operator from increasing such charges without 30 days prior written notice; and prohibits the operator from collecting undisclosed charges, or evicting a tenant or owner for refusal to pay such undisclosed charges.

¹⁰ However, it does appear from the evidence that these tenants probably paid substantially less than they would have had they been directly served by Toledo Edison given the mall's more advantageous rates and energy management system.

Finally, we believe our decision in this case is consistent with the Commission's treatment of similar situations in the telecommunications and gas industries.¹¹ The mall/tenant electric service arrangements in the instant case closely parallels shared tenant services where a third-party provides telecommunications services to the occupants of multi-tenant buildings, complexes, or developed properties through a private branch exchange. In *In re Commission Investigation of Resale and Sharing of Local Exchange Telephone Service*, Case No. 85-1199-TP-COI (August 19, 1986), we determined that such arrangements are not subject to this Commission's regulatory jurisdiction because these service providers are not public utilities, but private operations which do not offer services to the general public. In the natural gas industry, Section 4905.90(II), Revised Code, expressly excludes the operator of a master-meter system from the definition of a public utility under Section 4905.02, Revised Code, and of a gas or natural gas company under Section 4905.03, Revised Code.

With respect to the issues raised in our March 16, 1995 Entry in this case, we conclude that Toledo Edison has no obligation to directly serve the tenants at either North Towne or Southwyck absent the landlords' request for such direct service. In addition, since the company's obligation to serve either facility ends at the landlord's property line, Toledo Edison's power to prohibit or restrict electrical service between the landlord and tenants through the company's tariff must also end at the landlord's property line.¹² Accordingly, Toledo Edison's tariff provision is void to the extent it prohibits or restricts the landlord's provision of electrical service or related billing practices as they apply to the resale or redistribution of electric service from a landlord to a tenant, and the issue of whether the tariff was violated by the landlords' practices is moot. The company's tariff provision which prohibits the resale or redistribution by these landlords is unreasonable, and should be amended or withdrawn. We also note that Toledo Edison's resale tariff provision predates the Certified Territory Act, and we believe the intention of the provision was to protect the company, rather than tenant end-users, by preventing competition from the company's own customers. Moreover, the complainants have failed to demonstrate any compelling rationale for the treatment of tenants as third-party beneficiaries. In addition, the only remedy provided by the tariff, termination of service to North Towne and Southwyck, renders this provision so unpracticable as to be unenforceable.

Accordingly, we find that Toledo Edison has no valid right or interest in attempting to prohibit or economically regulate such resale or redistribution; and the

¹¹ Our decision is also consistent with and clarifies our opinion in *Shroyer* since, in that case, the park owner did not own the mobile homes to which water and sewer services were being provided.

¹² However, our ruling today does not limit the Commission's authority to set reasonable terms and conditions on jurisdictional utilities providing master meter service so as to ensure that users of that service, such as landlords, are providing it to the ultimate end user in a manner which is safe and consistent with the public interest. This authority includes the residential master-metered rules and disconnection procedures in Rules 4901:1-18-05(A)(3) and 4901:1-18-07, O.A.C. As noted in *Shroyer*, the Commission has the requisite authority in its regulation of public utilities to set terms and conditions on the resale of a utility's service to ensure that such service is provided in a manner which is safe and consistent with the public interest. *Shroyer, supra*, at 5.

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company's tariff provision which attempts to economically regulate such resale or redistribution is void with respect to these circumstances. Therefore, we direct Toledo Edison to amend its tariff to comply with our findings in this case. Moreover, through this opinion, we are putting all other jurisdictional electric utilities on notice that each should review its tariff provisions and amend any resale prohibitions as may be necessary to conform to actual industry practices and our findings in this case. Having found Paragraph 19(I) of Toledo Edison's tariff P.U.C.O. No. 7 to be void with respect to the practices of Simon and SSC, the issue of whether such practices violated the tariff is now moot, and need not be addressed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On December 15, 1994, Michael E. Brooks and Raoul J. Sartori, Perfect Playhouse, Darryl's, and Laurence Mitchell filed this complaint pursuant to Section 4905.26, Revised Code, against Toledo Edison, Simon, New Towne Mall Company, and SSC alleging that Simon and SSC resold or redistributed electrical service to their respective tenants in violation of Toledo Edison's tariff P.U.C.O. No. 7, Paragraph 19(I).
- (2) By entry issued March 16, 1995, the Commission dismissed Simon, New Towne Mall Company, and SSC as respondents in finding that the landlords were not public utilities subject to Commission jurisdiction. On April 14, 1995, the complainants filed an application for rehearing, which was denied by entry on May 4, 1995. On July 28, 1995, Simon filed a motion to intervene which was granted by entry issued September 6, 1995.
- (3) The hearing of this matter was held on November 8, 1995, at the offices of the Commission. Notice of the hearing was published in accordance with Section 4905.26, Revised Code.
- (4) Pursuant to Section 4905.26, Revised Code, this Commission has jurisdiction to consider the matters raised in the complaint, including the extent of the Commission's jurisdiction in resolving the issues raised therein. *State, ex rel. Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 173 Ohio St. 450, 183 N.E.2d 782, 20 O.O.2d 74 (1962).
- (5) Toledo Edison has no valid right or interest in prohibiting or restricting the electrical service and related billing practices by Simon and SSC to their respective tenants at the North Towne Square Mall and the Southwyck Shopping Center; and Paragraph 19(I) of Toledo Edison's tariff P.U.C.O. No. 7 is void

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to the extent it applies to such resale or redistribution of electrical service.


It is, therefore,

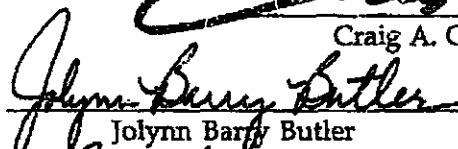
ORDERED, That the complaint be dismissed. It is, further,


ORDERED, That the Toledo Edison Company amend its tariff in accordance with this Opinion and Order. It is, further,


ORDERED, That a copy of this Opinion and Order be served upon each party of record and all other jurisdictional electric utilities.

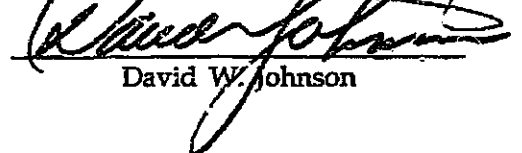
THE PUBLIC UTILITIES COMMISSION OF OHIO


Craig A. Glazer, Chairman


Jolynn Barry Butler


Richard M. Egan


Ronda Hartman Fergus


David W. Johnson

RMB;geb

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Gary C. Vigorito
Secretary