

In the Matter of the Commission's)
Investigation of Submetering in the State of) Case No. 15-1594-AU-COI
Ohio)

and that the Commission should continue to decline jurisdiction due to the fact that these entities are not public utilities.

II. Factual Background

The Ohio Apartment Association (OAA) is a federation of nine local apartment associations representing all corners of the state. OAA members own or manage about 500,000 rental units across the State of Ohio. The International Council of Shopping Centers (ICSC) is the global trade association of the shopping center industry. It has more than 70,000 members in over 100 countries, including shopping center owners, developers, managers, investors, retailers, brokers, academics, and public officials. As of 2014, there are over 4,400 shopping centers located in the State of Ohio. OAA and ICSC represent the interests of many of Ohio's residential and commercial landlords.

Under Ohio law, the responsibility for the provision of utilities may rest with either the landlord or the tenant. Ohio Revised Code 5321.04 provides that residential landlords must “[s]upply 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.” The lease between the residential landlord and tenant specifies how utilities will be provided and each parties’ responsibilities. In contrast, there is very little statutory law with regard to the rights and obligations of commercial landlords and tenants. Therefore, many of the rights and duties imposed on commercial landlords and tenants will be based on the lease provisions. Thus, there are many properties throughout the State of Ohio where the landlord is the consumer of the utility services for the entire property.

In those instances where the landlord is the consumer of the utility services, the landlord may recoup the cost of the utility services from the tenants. While some OAA and ICSC members include utility services as a set proportion of the rent, many OAA and ICSC members routinely utilize submetering and Ratio Utility Billing Systems (RUBS) to bill tenants for utility services. Submetering involves the installation by the landlord of a utility meter to measure and record a unit's actual usage; RUBS involves the use of a mathematical formula (usually based on factors like number of tenants per unit or square footage) to approximate each unit's proportional usage for each utility bill. Water submetering is the most common, but gas and electric utilities can also be handled by submetering.

III. OAA and ICSC Comments

A. Are condominium associations and similarly situated entities, including third-party agents of those entities, public utilities pursuant to the *Shroyer* test?

Under the *Shroyer* test OAA and ICSC members are not public utilities. As was the case in *Shroyer* and the cases that followed it:

1. OAA and ICSC members have not manifested an intent to be a public utility by availing themselves 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 the use of the public right of way for utility purposes;
2. The utility services offered by OAA and ICSC members are not available to the general public, but only to tenants; and
3. The provision of utility services are ancillary to the primary business of OAA and ICSC members, that of owning, managing and providing residential and commercial rental premises to specific tenants.

A landlord's ultimate duty to tenants is to provide premises that are habitable or usable for the purposes for which they are held out, whether that be residential or commercial. In those facilities where tenants do not have direct connection to public utilities, the provision of utility services by a landlord is an ancillary part of the ultimate duty of providing habitable or usable premises. In those facilities where a landlord provides utility services, they are entitled to recoup the costs of the utility services used by tenants from those tenants. Submetering is simply a method that allows landlords to more accurately assess and bill each tenant for their individual usage of utility services.

While including utility services as a fixed proportion of rent may provide tenants with stable utility expenses, this method can actually disadvantage both the landlord and the tenant. The landlord generally bases their charges for utilities based on past usage, but past usage is not always an accurate predictor of future usage. Where it is not, either the landlord is disadvantaged because he did not collect enough to cover usage or the tenants are disadvantaged by having paid too much. Theoretically this would be balanced out over the long term, but not all tenants are long-term tenants. Additionally, some tenants will likely always be paying more than their fair share and some will be paying less - one would not expect a single tenant to consume as much water or electricity as a family of four but each tenant may be charged the same amount. Submetering helps solve these inequities by ensuring that no tenant is over- or under-charged and by ensuring that the landlord has adequate funds to cover costs. It has the added benefit of empowering tenants to control their own utility costs by having costs reflect usage.

Fundamentally, submetering is a contractual relationship between the landlord and the tenant. Leases between landlords and tenants are detailed legal documents, particularly

commercial leases. These leases typically include terms regarding who is responsible for utilities and any billing arrangements. They also typically include dispute resolution provisions. Any disputes can be adequately addressed by the terms of the lease. Additionally, it is important to note that utility service is not considered a profit center for landlords due to the competitive nature of the market to secure tenants. As past Commission and Ohio court decisions have affirmed, submetering does not impact the greater policy concerns that led to the regulation of public utilities. It is important to note that this remains true despite changes in the electric utility markets since the creation of the *Shroyer* test. The Commission and the Court have affirmed the *Shroyer* test and refused jurisdiction in a submetering case since the enactment of the state's deregulation legislation.³

B. Are there certain situations in which the *Shroyer* test cannot or should not be applied? If the *Shroyer* test cannot or should not be applied, what test should the Commission apply in those situations?

OAA and ICSC strongly believe that its members are consumers of the utility services and not public utilities, regardless of whether the submetering is the responsibility of the landlord or a third party contractor. Under current law, OAA and ICSC believe that the *Shroyer* test is the appropriate test for whether an entity is a public utility subject to the jurisdiction of the Commission. Any other test would require a change in the law and is appropriately addressed by the state legislature.

C. What impacts to customers and stakeholders would there be if the Commission were to assert jurisdiction over submetering in the State of Ohio?

³ *In re FirstEnergy*, Case No. 99-1212-EL-ETP, et al., Entry dated November 21, 2000; *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485.

There are substantial regulatory and cost burdens associated with being a public utility that OAA and ICSC members are not prepared to assume and which would create a significant financial hardship. While OAA and ICSC members are very familiar with property issues, tax concerns and marketing, they are not equipped to be a highly regulated public utility. The cost to acquire such expertise and to manage the regulatory requirements would dwarf their regular conduct of business. Additionally, though many OAA and ICSC members are large, sophisticated businesses, many are also small, family-run, locally-based businesses that would never be able to function as a public utility. The consequence of declaring these businesses to be public utilities is that many, if not all, would cease all submetering and return to the previous practice of including utilities as a set proportion of rent, with all the intending disadvantages described above.

IV. Conclusion

OAA and ICSC assert that the *Shroyer* test remains the appropriate method for assessing whether an entity is a public utility under Ohio Revised Code 4905.02, 4905.03, 4928.01 and 4928.08. OAA and ICSC respectfully request that the Commission deny jurisdiction as landlords employing submetering practices are not public utilities under the law.

Respectfully submitted,

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Summary: Comments of the Ohio Apartment Association and the International Council of Shopping Centers electronically filed by Ms. Maryellen K. Corbett on behalf of Ohio Apartment Association and International Council of Shopping Centers