

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's
Investigation of Submetering in the
State of Ohio.

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Case No. 15-1594-AU-COI

**REPLY COMMENTS OF
INDUSTRIAL ENERGY USERS-OHIO**

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I. INTRODUCTION

On December 16, 2015, the Public Utilities Commission of Ohio ("Commission") initiated an investigation regarding the proper regulatory framework that should be applied to submetering and condominium associations in Ohio. Entry at 1 (Dec. 16, 2015) ("Entry"). As Industrial Energy Users-Ohio ("IEU-Ohio") demonstrated in its initial comments, the regulatory framework that should be applied to submetering must conform to the jurisdictional requirements of Title 49 of the Ohio Revised Code and the accepted legal standards used to determine whether an entity is a public utility. Under this legal framework, the determination whether an entity, or its agent, is subject to Commission jurisdiction is based on a review of the facts and circumstances presented by the particular activities of the entity or its agent. Further, the Commission must consider the statutory exceptions to its jurisdiction. Initial Comments of Industrial Energy Users-Ohio at 4 & 7 n.6 (Jan. 21, 2016) ("IEU-Ohio Comments"). As Mr. Whitt correctly notes in his initial comments, the issues presented by this investigation cannot address the determinations that may be presented in an individual case. "Different facts may implicate

different rules of law.” Initial Comments of Mark Whitt at 7 (Jan. 21, 2016) (“Whitt Comments”).

As IEU-Ohio also demonstrated in its initial comments, large industrial customers rely on the Commission’s consistent application of the legal standards used to determine if an entity is subject to Commission regulation so that they can engage in voluntary arrangements among customers to receive electricity, natural gas, water or wastewater treatment services through a “master-meter,” or jointly or individually owned facilities, plant, or equipment. These arrangements arise voluntarily and have become more common over time because corporations have spun off or separated individual business units that may have separate corporate identities even if commonly owned. IEU-Ohio Comments at 7-8. Sweeping these voluntary shared service arrangements under Commission jurisdiction would impose unnecessary costs without any advancement of the public interest.¹

The Comments filed by Ohio Power Company (“AEP-Ohio”) and Duke Energy Ohio, Inc. (“Duke”),² the Office of the Ohio Consumers’ Counsel (“OCC”) and the Ohio

¹ The interest of customers in predictable application of existing law is not limited to industrial customers. As the comments of Building Owners and Managers Association of Greater Cleveland (“BOMA Comments”) explain:

The cost associated with changing internal electrical distribution will reduce the ability for landlords and commercial building owners to make other investments, such as energy efficiency improvements or new infrastructure buildout. Moreover, Commission jurisdiction over landlord submetering could result in significant interference with the existing negotiated contracts between the landlord and tenant.

BOMA Comments at 1.

² Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. (Jan. 21, 2016) (“AEP-Ohio/Duke Comments”).

Poverty Law Center (“OLPC”),³ and Nationwide Energy Partners, LLC (“NEP”),⁴ however, propose departures from current law. Although based on different starting points, the AEP-Ohio/Duke and OCC/OLPC Comments reach the same conclusion and would sweep submetering relationships under Commission jurisdiction. NEP, on the other hand, argues that current case law excludes submetering arrangements from Commission supervision. As discussed below, the Commission should reject these alternative approaches because they are not supported by well-understood legal requirements, would disrupt business relationships that should not be supervised by the Commission, and would not serve the public interest.

II. DISCUSSION

A. **The AEP-Ohio/Duke proposal to sweep all submetering based on what the entity bills the end user is unlawful, over-inclusive, and unworkable**

AEP-Ohio and Duke propose the following definition that would eliminate unregulated submetering by focusing on the billing arrangement between the service provider and its customer: “[f]or purposes of determining whether an entity constitutes an ‘electric light company’, a ‘natural gas company’, or any other type of utility provider set forth in R.C. 4905.03, any entity that charges end-use customers for the utility service in question satisfies the statutory definition.” AEP-Ohio/Duke Comments at 24. In application, Commission jurisdiction under the AEP-Ohio/Duke proposal would cover all landlords and submetering companies that assess separate rates or markups for utility usage. *Id.* at 24-25.

³ Joint Comments On Protecting Ohioans From Excessive Charges From Utility Submeterers By The Office Of The Ohio Consumers' Counsel And The Ohio Poverty Law Center (Jan. 21, 2016) (“OCC/OPLC Comments”).

⁴ Initial Comments of Nationwide Energy Partners, LLC (Jan. 21, 2016) (“NEP Comments”).

The AEP-Ohio/Duke Comments recognize the disruptive effect of their proposal and suggest three limitations. *Id.* at 26. First, they offer that landlords and condominium associations that include utilities in rent or condominium dues may not count as public utilities. Second, AEP-Ohio and Duke would carve out an exception for those entities that pass-through utility charges without any “markup.” *Id.* at 28. Third, AEP-Ohio and Duke would not oppose a Commission order allowing current submetering arrangements to continue for a reasonable transition period. *Id.* at 29.

The Commission should reject the proposal for several reasons. First, the AEP-Ohio/Duke proposal ignores the Court’s recognition that the statutory definition of what constitutes an entity subject to Commission jurisdiction is not “self-applying.” *Pledger v. Pub. Util. Comm’n of Ohio*, 109 Ohio St.3d 463, 465 (2006). As noted above, the determination whether an entity, or its agent, is subject to Commission jurisdiction is based on a review of the facts and circumstances presented by the particular activities of the entity or its agent, not the categorical application of jurisdiction to all entities that may bill another entity for utility service.

In addition to being unlawful, the proposal is also over-inclusive. Applying a categorical rule based on billing arrangements fails to account for the statutory exceptions for cooperatives and other arrangements. See R.C. 4905.02. It also ignores legal and practical realities. As the Commission has previously found, the Commission has neither the statutory authority nor the staff to insert itself into the landlord-tenant relationship so long as the landlord’s actions are consistent with the tariffs of the regulated utility from which the service is obtained. *In re Complaints of Inscho v. Shroyer’s Mobile Homes*, Case Nos. 90-182-WS-CSS, *et al.*, Opinion and Order (Feb. 27, 1992).

Moreover, the AEP-Ohio/Duke proposal could unnecessarily sweep shared services arrangements under Commission jurisdiction if the billing arrangements do not fall into one of the ill-defined exceptions offered by AEP-Ohio and Duke. As noted above, however, these arrangements do not present the factual circumstances that justify Commission supervision. See IEU-Ohio Comments at 7-8.

The exceptions recommended by AEP-Ohio/Duke do not rectify the practical problems associated with their proposal. In particular, the second and third exceptions that AEP-Ohio and Duke propose take a bad idea and make it worse.

The second exception for those landlords that pass-through the utility costs at the serving utilities' rates does not provide any practical means of limiting the unnecessary sweep of their proposal.⁵ In particular, submetering is often used in instances in which the end-use customer's utility service is not metered. In those instances, there would be no practical way to determine whether the end-use customer is being billed properly. Thus, the second exception offered by AEP-Ohio and Duke is unworkable.

The third exception grandfathering all existing submetering arrangements for some undefined transition period would permit existing arrangements to continue even if an entity was acting unlawfully. In addition to being a poor outcome for the injured customer, this result would also be a violation of law; the Commission cannot refuse to act if its jurisdiction is properly invoked. *State, ex rel. General Motors Corp., v. Industrial Comm'n*, 117 Ohio St.3d 480 (2008) (an agency may be compelled to perform its duties).

⁵ The AEP-Ohio/Duke Comments demonstrate that the proposal lacks any well-defined concept of what is the centerpiece of the exception. In a footnote, the Comments recognize that the Commission would have to define "exactly" what is a pass-through. Then the Comments add that additional rules would be needed to avoid "gaming" if the landlord shops for competitive generation service. AEP-Ohio/Duke Comments at 28, n.1.

B. The OCC/OPLC and NEP “bright line” proposals do not comply with Ohio law

In contrast to AEP-Ohio and Duke, which focus on the billing arrangements between the landlord and the tenant, OCC, OLPC, and NEP focus on the function of metering.

Noting that the Commission has found that metering is a traditional function of a public utility, OCC and OLPC argue that the Commission should incorporate the “traditional function” doctrine into the *Shroyer* test as a means of setting a dividing line between public utility and non-public utility functions. OCC/OPLC Comments at 8-9. Although the OCC/OPLC Comments suggest that certain transactions may be outside Commission jurisdiction, the recommendation sweeps submetering under Commission authority so as to “ensure that the [Commission] exercises the maximum extent of its statutory jurisdiction over entities that seek to enjoy all the benefits granted to a public utility while evading the regulatory oversight that comes along with that status.” OCC/OPLC Comments at 13.

Relying on prior Commission decisions regarding submetering by landlords, NEP reaches the opposite conclusion, urging the Commission to find that submetering is outside the Commission’s jurisdiction. According to NEP, asserting jurisdiction over submetering would upend established law, create unnecessary regulation and confusion, and compromise the Commission’s ability to operate effectively. NEP Comments at 8-10.

Neither argument conforms to Ohio law because both the OCC/OPLC and NEP Comments ignore that a determination of public utility status is a mixed question of law and fact. *A & B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64 Ohio

St.3d 385, 387 (1992). Thus, there is no legal basis for a categorical test that submetering entities are subject to or not subject to Commission jurisdiction.

The comments critical of NEP filed by the Utility Management and Conservation Association (“UMCA”) demonstrate why a categorical test is unworkable under the applicable legal standard. In its comments, UMCA distinguishes the practices of its members from those of NEP. Comments of Utility Management and Conservation Association at 2 (Jan. 21, 2016). As these comments demonstrate, business purpose and other practices in addition to whether an entity engages in submetering are relevant to the determination of an entity’s status as a public utility. If the Commission relied solely on a categorical test, however, such a test would prevent the Commission from inquiring into whether the entity by its activities affects the public interest and should be subject to Commission supervision. See IEU-Ohio Comments at 8-10 and Whitt Comments at 4-5. Because such a test would improperly narrow the inquiry the Commission should make before it exercises its jurisdiction, the Commission should reject it.

III. CONCLUSION

“Simple” tests based on billing arrangements and categorical inclusions (or exclusions) do not provide a lawful or reasoned answer to the questions the Commission presented in this investigation. Accordingly, the Commission should reject the various proposals of AEP-Ohio/Duke, OCC/OPLC, and NEP and instead continue to address the question of its jurisdiction over an entity, or its agent, by determining the mixed question of law and fact on a case by case basis.

Respectfully submitted,

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ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document. In addition, I hereby certify that a service copy of the foregoing *Reply Comments of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the parties of record this 5th day of February 2016, *via* electronic transmission in Case No. 15-697-EL-CSS.

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