BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY COMMENTS OF
THE BUILDING OWNERS AND MANAGERS ASSOCIATION
OF GREATER CLEVELAND

I. INTRODUCTION

The Building Owners and Managers Association of Greater Cleveland ("BOMA Cleveland") respectfully submits these Reply Comments in response to initial comments filed in this proceeding by various stakeholders on January 21, 2016. The initial comments were filed pursuant to the Public Utilities Commission of Ohio's ("Commission" or "PUCO") December 16, 2015 Entry (the "Entry") opening this docket to obtain stakeholder views on a series of questions pertaining to submetering in Ohio.

For many decades, numerous BOMA Cleveland members, as landlords, have submetered utilities for office and commercial tenants in properties the landlords own. The submetering arrangement was included as part of the existing lease arrangements between landlord and tenant, and was specifically sanctioned by the electric distribution utilities ("EDUs").[1] In accordance with this precedent, the Ohio Supreme Court held in *FirstEnergy Corp. v. Pub. Util. Comm.*, 2002-Ohio-4847, ¶9 ("*FirstEnergy* Corp.")that "office buildings, apartment houses, and shopping

[1] See *Shopping Centers Assn. v. Pub. Util. Comm.* (1965), 3 Ohio St.2d 1, at 3 ("It would seem apparent that formerly under sanction of the Public Utilities Commission of Ohio, [Cleveland Electric Illuminating Company] supplied various businesses and establishments with electric energy at a fixed point and for some time permitted these businesses and establishments to resell by submetering a part of such electric energy to lessees, tenants and to others with whom they had business relationships. There were advantages to the Company in so doing. It thereby escaped the expense of installing and maintaining equipment to extend its operations.") See, also, *Jonas v. Swetland Co.* (1928), 110 Ohio St. 12.

centers are 'consumers' of electricity [within the meaning of R.C. 4905.03] even though these consumers may resell, redistribute or submeter part of the electrical energy to their tenants." BOMA Cleveland's EDU's have recognized this principle in their PUCO approved tariffs. For example, The Cleveland Electric Illuminating Company's P.U.C.O. No. 13 Original Sheet 4, page 10 of 24, Electric Service Requirements, provides as follows:

> C. Resale:
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> 1. Electric service is provided for the sole use of the customer, who shall not sell any of such service to any other person, or permit any other person to use the same, without the written consent of the Company.
> 2. **The above provision does not apply to service provided to a landlord for resale or redistribution to tenants where such resale or redistribution takes place only upon property owned by the landlord and where the landlord is not otherwise operating as a public utility**." [Emphasis added.]

The genesis of the Commission's current investigation into submetering[2] appears to be several complaints and Columbus Dispatch investigative articles involving submetering practices of a few companies affecting a small number of residential customers living in central Ohio condominiums and trailer parks.

None of the initial comments filed in this case by consumer representatives (and their interest groups) or non-utility representatives (and their interest groups) advocated that the Commission change the *Shroyer* test to regulate commercial landlords that have existing lease agreements, or that commercial tenants need consumer protection by the PUCO. Only the initial comments of Ohio Power Company and Duke Energy Ohio, Inc. ("AEP/Duke Initial Comments") advocate that the Commission reconsider the *Shroyer* test in <u>all</u> circumstances (including

[2] An investigation on the same issues precipitated the *FirstEnergy* appeal. *FirstEnergy* is dispositive of the issues raised in this investigation as to commercial landlords.

condominiums) and adopt a test that would effectively eliminate submetering in nearly all cases.[3] As discussed in Section II herein, such a test is not supported by Ohio law, is not necessary or desirable from a regulatory policy standpoint, and is self-serving for these two utilities.

Importantly, no other Ohio utility advocated for this kind of radical regulatory change. Dayton Power & Light Company did not, and recognized a reasonable distinction between residential customers and submetered commercial and industrial customers.[4] Moreover, BOMA Cleveland's members' EDU, the FirstEnergy utilities, did not file any initial comments in this proceeding. As the Commission has recognized consistently, there is no regulatory purpose to treat commercial landlords as public utilities as it would insert the Commission into the business of regulating landlord-tenant relationships, a role better left to the courts through the application of general civil laws. *Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987, Entry March 16, 1995 at 6.[5] The current controversy surrounding submetering of residential customers in central Ohio condominiums does not rise to a need to change the Commission's longstanding policy or Ohio law that there is no need to regulate commercial landlords.

BOMA Cleveland respectfully requests that the Commission not depart from existing, long standing regulatory policy expressed in *Shroyer*. As related to commercial landlord and tenant relationships, there is no reason for the Commission to change its decades-old policy or to depart from the Ohio Supreme Court's ruling in *FirstEnergy Corp*.

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[3] AEP/Duke Initial Comments at page 16 and pp. 21-25.

[4] Dayton Power & Light Company Initial Comments at page 5.

[5] See also R.C. 4928.40(D) which was part of Amended Substitute State Bill 3 "…[n]o electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service."

II. REPLY COMMENTS TO COMMISSION'S QUESTIONS

The AEP/Duke Initial Comments purport to identify a litany of consumer protection harms to utility customers from the practice of submetering. It appears that AEP's and Duke's true motives may not only be to advocate for consumer protection but to gain additional distribution revenues and profits from retail consumers that are lost to submetering activities on their systems.

AEP/Duke advocate the following, completely new test for Commission jurisdiction:

> "For purposes of determining whether an entity constitutes an 'electric light company,' a 'retail gas company' or any other type of utility provider, set forth in R.C. 4905.03, any entity that charges end-use customers[6] for the utility service in question satisfies the statutory definition." (AEP/Duke Initial Comments at p. 23)

This test would make every commercial landlord in Ohio a public utility. It fails to reflect current public utility statutes[7] or to take into account all of the factors that the Ohio Supreme Court and the Commission have considered over the past 100 years in determining whether an entity is an Ohio public utility. That determination is not susceptible to a bright line test; it is a mixed question of both law and fact.[8] Factors to be considered must include:

1. Does the entity hold itself out to the general public which has the right to obtain the service? [9]
2. Does the entity avail itself of special benefit privileges such as a franchised territory, or use of public right of way by a utility, or a certificate of public convenience and necessity, or the use of eminent domain, that are conferred upon public utilities?[10]
3. Is the provision of service by a landlord incidental to the landlord's primary business? [10]

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[6] AEP/Duke's proposal that a change to "end-use customers" is determinative in whether an entity is a "public utility" under R.C. 4905.03, violates the Court's holding in *FirstEnergy Corp*. that the "consumers" referred to in R.C. 4905.03 under a submetering arrangement are "office buildings, apartment houses, and shopping centers," and not "end-use customers." *FirstEnergy Corp.* at ¶9.

[7] See, e.g., R.C. 4905.03 and 4928.40(D), discussed herein.

[8] *A & B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64 Ohio St. 3d 385, 387 (1992) ("*A & B Refuse*").

[9] *Southern Ohio Power Co. v. Public Util. Comm. of Ohio*, 110 Ohio St. 246, 252 (1924); *A & B Refuse, at 387.*

[10] See *Brooks et al. v. Toledo Edison Co.* Case No. 94-1987 Entry (March 16, 1995).

In applying these tests, there is also a policy question for the Commission. Is there a need from a regulatory standpoint for consumer protection of the customer or is the consumer sophisticated and capable of bargaining (*i.e.,* is there a need to regulate to protect the consumer)?

BOMA Cleveland submits that private lease agreements between office and commercial landlords with sophisticated tenants that provide for landlords to submeter utilities to such tenants in buildings they own or manage do not meet any of the these essential attributes to constitute a public utility under Ohio law or to warrant a PUCO policy change to regulate them. If AEP and Duke wish to rewrite Title 49 of the Ohio Revised Code or overturn established Ohio Supreme Court precedent, the Legislature is the proper forum, not the Commission.

III. CONCLUSION

BOMA Cleveland respectfully requests that the Commission not depart from the *Shroyer* test, and not change decades of practice and policy to attempt to assert jurisdiction over the commercial landlord/tenant relationship. There are no customers in this case, commercial or otherwise, advocating that the Commission do so. BOMA Cleveland takes no position with respect to the Commission's oversight over residential condominium submetering, although the Ohio Legislature may be better suited to make this policy determination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Comments was served upon the parties of record listed below this 5th day of February 2016 *via* electronic mail.

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