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

JOINT APPLICATION FOR REHEARING OF OHIO POWER COMPANY; DUKE ENERGY OHIO, INC; AND OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

Pursuant to Ohio Revised Code ("R.C.") Section 4903.10 and Ohio Administrative Code ("O.A.C.") Rule 4901-1-35, Ohio Power Company ("AEP Ohio"); Duke Energy Ohio, Inc. ("Duke"); and Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (together with AEP Ohio and Duke, "Joint Applicants") respectfully file this Application for Rehearing of the Commission's December 7, 2016 Finding and Order ("Finding and Order") in this proceeding.

Joint Applicants commend the Commission for taking steps to regulate submetering entities and thereby curtail the substantial harm to customers that submetering causes. *See generally* Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 2-16 (describing the ways in which submetering harms customers). As requested by the Commission, Joint Applicants intend to submit comments regarding the "reasonable threshold percentage to establish the rebuttable presumption for which the provision of utility service is *not* ancillary to the landlord or other entity's primary business." *See id.* at 11-12.

However, before submitting comments, Joint Applicants make this application for rehearing to encourage the Commission to reformulate the "rebuttable presumption" to better align with R.C. Title 49 and the economics of submetering. Because the Commission

determined certain matters in its Finding and Order and only left open other matters for further comment, this Application for Rehearing is necessary. As explained in the attached Memorandum in Support, the proposed test for when to apply the rebuttable presumption is unjust and unreasonable because, under at least one interpretation, it will allow submetering companies to continue their current business model and thereby continue to cause substantial harm to customers in Ohio. As a replacement, the Commission on rehearing should adopt a revised test that modifies, as follows, the Commission's formulation of the proposed "rebuttable presumption" on page 9 of its Finding and Order:

> Under the third prong of the *Shroyer Test*, when determining whether the provision of utility service is ancillary to the landlord's or other entity's primary business, the Commission should apply a rebuttable presumption that the provision of utility service is not ancillary to the landlord's or other entity's primary business if the landlord or other entity charges above *what the landlord or submetering entity pays for the utility service it is reselling to an end user*.

But while a rebuttable presumption (if properly structured) can be a practical method to quickly and easily determine whether a submetering company may be offering utility services to end users for a profit, the ultimate standard for determining whether a submetering company is acting as a utility should be whether the submetering company is in fact turning a profit for reselling utility services to end users.

The reasons for adopting this revised test are described in detail in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

As Joint Applicants have explained in previous filings, submetering causes substantial harm to utility customers in a manner that is at odds with the clear utility policies of both the General Assembly and this Commission. Among other things, submetering customers (1) cannot shop for generation supply, (2) often face hidden (or very hard to find) rates, (3) do not have the benefit of Commission rate regulation, (4) lack important customer protections, such as those related to disconnection of service, and (5) are unable to participate in utility services such low-income assistance or energy efficiency programs. *See generally* Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 2-16. Accordingly, Joint Applicants have contended – and continue to contend – that the Commission should adopt an approach that limits submetering to the greatest extent possible. *See id.* at 16-31.

In its Finding and Order in this proceeding, the Commission signaled an intention to bring submetering arrangements within its jurisdiction and to end the many harms submetering causes. Joint Applicants commend the Commission for this initial step, and Joint Applicants will work within the Commission's proposed approach by filing the comments requested by the Commission.

However, insofar as the Finding and Order intended to adopt an approach that would limit submetering, Joint Applicants believe that the Commission must revisit its proposed approach, and Joint Applicants have brought this application for rehearing to encourage the Commission to do so. As discussed below, under the approach adopted in the Finding and Order, submetering companies will be able to earn considerable profit – as much as a 45% profit margin in a typical apartment building – while continuing to escape regulation as a public utility.

That outcome will do little to alleviate the many harms caused by submetering, and is unlikely what the Commission intended. Instead, as discussed below, the Commission should adopt a revised test that considers any submetering entity to be a public utility if it makes any profit – or charges any markup to customers – in reselling utility service.

I. The Commission's reformulation of the *Shroyer Test* is unreasonable and unlawful insofar as it will allow submetering entities to earn a substantial profit from reselling utility service while escaping regulation as a public utility.

The principal flaw in the Commission's reformulation of the *Shroyer Test* is the measuring stick the Commission chose to apply the "rebuttable presumption" that resale of utility service is "not ancillary to the landlord's or entity's primary business" under the third prong of the *Shroyer Test* – or at least how that measuring stick is interpreted and applied. *See* Finding and Order at 9. The Commission proposed the following test: "[I]f a landlord or other entity resells or redistributes utility services and charges an end use customer 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, then it will create a rebuttable presumption that the provision of utility service is not ancillary to the landlord's or entity's primary business." *Id.* (emphasis added). Thus, as proposed, the "rebuttable presumption" would only apply if the submetering entity charges more than an electric distribution utility's standard service offer. *See id.*

As an initial matter, this test is ambiguous. It is not clear what the Commission meant by "a similarly situated customer" – for example, whether this is a "similarly situated" residential customer served under a residential tariff, or a "similarly situated" landlord customer being served under a different tariff for service to the building's master meter. Along the same lines, it is not clear what is meant by "an electric utility's standard service offer." Does this refer only to

the SSO *generation* rate, or does it refer to the fully bundled SSO tariff, including generation and wires charges?

Critically, moreover, if the Commission intended to allow a submetering entity to charge a threshold percentage above *the fully bundled SSO tariff rate charged to residential customers*, the Commission's rebuttable presumption is effectively toothless because it would allow submetering entities to make a substantial profit while avoiding regulation as a public utility. Understanding how this is so requires an examination of the economics of submetering. Submetering companies purchase electric service to a building "master meter" from a public utility such as Joint Applicants. This master meter service is charged under a higher usage (and typically higher voltage) tariff and, as a result, is charged at a lower rate for distribution services than an individual residential tariff. Submetering companies then mark-up the lower master meter service rates and charge each individual tenant under a higher rate. The key for a submetering company's business model is this difference (or "delta") between the master meter rate and what the company charges each individual tenant or owner. The delta reflects substantial profit and is the reason that submetering companies are in business.

The problem with the Commission's test is that submetering companies can still make a considerable profit even if they only mark-up the master meter rate to "an electric utility's standard service offer." Finding and Order at 9. Consider the following example involving a typical apartment building with 100 units. In this example, which for illustration references AEP Ohio's rates, a submetering company buys service for the building at the master meter rate and then charges no more than the "electric utility's standard service offer" to tenants:

(a)	Apartment units:	100
(b)	Monthly usage per unit:	1,000 kWh
(c)	Master meter usage:	100,000 kWh
(d)	Master meter SSO rate: (AEP Ohio CSP Rate Zone Schedule GS-3 – Secondary)	$0.08749 per kWh
(e)	Residential SSO rate: (AEP Ohio CSP Rate Zone Schedule R-R)	$0.12677 per kWh
(f)	Monthly master meter charges: (c) x (d)	$8,749
(g)	Monthly submetering charges to each tenant: (b) x (e)	$126.77
(h)	Total submetering revenue: (a) x (g)	$12,677
(i)	**Submetering profit: (h) - (f)**	**$3,928**

As the above example shows, even if a submetering entity only charges the "electric utility's standard service offer," *see* Finding and Order at 9, it can still earn a substantial profit: $3,928 per month, or $47,136 per year in the example above. That represents nearly a 45% profit margin. Even assuming a submetering entity has some administrative costs for reselling to end users, submetering will remain highly profitable even if the submetering entity only charges SSO rates. The impact on customers of these charges is considerable and unfair. By making as much as a 45% profit while escaping regulation as a public utility, submetering companies charge customers the same rate that public utility customers pay, but they provide none of the

important protections and benefits that public utility service involves – such as Commission oversight and rate regulation, protections concerning disconnection and quality of service, and programs such as low-income assistance and energy efficiency measures.

Furthermore, under the Commission's proposed test, submetering companies will be able to charge "a threshold percentage *above*" the utility's standard service offer. This will allow submetering companies to charge further markups – likely in the form of "administrative fees" or "infrastructure charges" – in addition to the markup illustrated in the example above. No matter what "threshold" the Commission ultimately selects, this will allow submetering companies to charge an even greater markup and make an even greater profit on the resale of electric service – all while escaping regulation as a public utility. That problem with the "SSO plus" framework is the reason Joint Applicants filed this Application for Rehearing prior to and separate from the comment period. Pending a final resolution of these issues by the Commission, Joint Applicants will continue to address their position on these and other points as part of the comment cycle.

In short, under the Commission's proposed test, submetering companies will be able to continue to earn a considerable profit while escaping regulation as a public utility. The test, therefore, may have little or no effect in curbing the proliferation of submetering, particularly for residential customers, nor is it likely to eliminate the many harms to customers that submetering causes.

II. On rehearing, the Commission should adopt a revised test that applies a rebuttable presumption if a submetering entity charges more than *what the entity pays for master meter service*.

Instead of the Commission's proposed test – which, as described above, will have little effect in curbing the many harms caused by submetering – the Commission should adopt on rehearing a different test for when to apply the "rebuttable presumption" that a submetering entity is a public utility. *See* Finding and Order at 9. Specifically, the Commission should apply

the rebuttable presumption whenever a landlord or submetering entity charges an end use customer more than *what the landlord or submetering entity pays for the utility service it is reselling to an end user*. In addition, while the rebuttable presumption can incorporate a practical and easy-to-use feature such as using the utility's SSO rate as a proxy for a competitive rate for generation service, the ultimate standard should be whether the submetering company is charging more to the end user than what it pays for the utility service it is reselling.[1]

Joint Applicants' revised test retains the same basic framework as the test proposed by the Commission. But instead of focusing on whether the submetering entity is charging more than the standard service offer (which, as described above, still permits substantial profit), it more appropriately focuses on whether the submetering entity is assessing *any* markup for its costs for electric service – that is, whether it is making any profit. This revised test should be adopted for four reasons:

First, Joint Applicants' revised test accords with the relevant statute, whereas the Commission's test does not. Section 4905.03(C) of the Revised Code provides that an entity constitutes an "electric light company" if it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state." On the one hand, a landlord or submetering entity that marks up master meter service and resells it to tenants at a profit is, straightforwardly, "*engaged in the business* of supplying electricity for light, heat, or power purposes to consumers within this state." R.C. 4905.03(C) (emphasis added). On the other

[1] Moreover, submetering entities have recently established CRES companies, and under this test, they could charge excessively high "master meter" generation charges and then "pass on" those charges to customers. Therefore, as a backstop, the Commission should also apply the rebuttable presumption any time a submetering entity "passes on" master meter generation charges that exceed a competitive rate for generation service, which could be measured against the proxy of the generation component of the utility's standard service offer.

hand, a landlord who merely passes through his own electricity costs without markup is not "engaged in the business" of supplying electricity – he may be supplying electricity, but not as a "business." Accordingly, the Commission's proposed test is at odds with the statutory definition because, as described above, it would allow a submetering company to continue to make substantial profit through resale of electric service, and thus continue to be "engaged in the business" of supplying electricity. Joint Applicants' revised test, by contrast, accords with the statute because it focuses on whether the submetering entity is making any profit by selling utility service and is thus in the business of providing electric service.

Second, Joint Applicants' revised test more closely matches the intent of the third prong of the traditional *Shroyer Test*, which focuses on whether "the provision of utility service is ancillary to the landlord's primary business"? If the submetering entity is merely passing on its costs, it is not making any profit and can plausibly contend that the provision of electric service is "ancillary" to its primary business under the third prong of the test. But if the submetering entity is charging more than its costs and making a profit, then the entity is using utility service as a profit center – utility service is no longer "ancillary" to the primary business of being a landlord, but is a profitable and separate line of business. In these circumstances, the Commission should apply the rebuttable presumption that the resale of electric service is "not ancillary to the landlord's or entity's primary business" under the third prong of the *Shroyer Test*. *See* Finding and Order at 9.

Third, Joint Applicants' revised test is more fair to submetering customers because it more accurately reflects the product they are receiving. As explained previously in this docket, submetering customers lack many of the rights and protections afforded customers of public utilities. For instance, submetering customers (1) cannot shop for generation supply, (2) often

face hidden (or very hard to find) rates, (3) do not have the benefit of Commission rate regulation, (4) lack important customer protections, such as those related to disconnection of service, and (5) are unable to participate in utility services such low-income assistance or energy efficiency programs. *See generally* Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 2-16. It is reasonable and fair for residential customers of Joint Applicants to pay the full SSO rate, because they receive the benefit of all of these rights and protections. But it is profoundly *unfair* for submetering customers to pay "an electric utility's standard service offer," Finding and Order at 9, because the product they are receiving is vastly inferior to what public utility customers receive.[2]

Fourth, and perhaps most importantly, Joint Applicants' revised test is likely to curtail unregulated submetering in this State and alleviate many of the substantial harms it causes. As noted above, submetering causes many harms. *See* Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 2-16. It is telling, moreover, how few meaningful *benefits* the proponents of submetering have identified in their many opportunities to comment in this and other dockets related to submetering. *See* Reply Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 1-3; *see also, e.g.*, Ohio Power Company's Reply in Support of Its Motion for Tariff Amendment at 1-4, Case No. 16-0782-EL-CSS. By expanding the *Shroyer Test*, the Commission's Finding and Order in this docket implicitly recognizes that submetering has become a serious problem in the State and should be addressed. But for the reasons discussed

[2] Insofar as submetering entities claim that they have "administrative" or internal distribution costs that must be recovered, they should recover such costs – as with all the other costs of operating a multiunit building – through *rent*, not by assessing a markup on utility charges. Any submetering entity that marks up utility service – whether for profit or to recover alleged "administrative charges" – is engaged in the business of providing utility service and should be regulated as a public utility.

above, *see supra* Part I, the Commission's test is unlikely to curtail submetering or bring an end to its many harms. Joint Applicants' revised test, however, better reflects the true economics of submetering and will not allow submetering companies who make a profit to escape regulation. Joint Applicants believe that applying this test will eliminate the incentive that submetering companies currently have to profit from submetering and will thereby discourage submetering and alleviate its many harms.

III. In all events, the Commission should retain jurisdiction over submetering issues and provide for an appropriate transition process.

As Joint Applicants have noted in this and other dockets, there are several issues that may arise as the Commission takes action to limit submetering and encourage existing submetered premises to convert to a situation in which public utilities provide individual meter service to tenants or occupants in submetered buildings. *See, e.g.*, Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 29-30; Reply Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 9-10; Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 10; Ohio Power Company's Reply in Support of Its Motion for Tariff Amendment at 6, Case No. 16-0782-EL-CSS. For example, for Joint Applicants to provide service to tenants or occupants who are currently submetered, Joint Applicants may need to install new infrastructure or take over infrastructure that was installed by landlords or submetering companies. These issues should not be viewed as obstacles to adopting Joint Applicants' revised test and more properly asserting jurisdiction over submetering entities. Rather, they are merely grounds for the Commission to retain jurisdiction over submetering issues and to provide for an appropriate transition process, including, among other things, timely cost recovery for necessary expenditures related to transitioning away from submetering.

CONCLUSION

For the foregoing reasons, the Commission should grant rehearing and adopt the revised test set forth above for applying the "rebuttable presumption" on the third prong of the *Shroyer Test*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Joint Application For Rehearing Of Ohio Power Company; Duke Energy Ohio, Inc; And Ohio Edison Company, The Cleveland Electric Illuminating Company, And The Toledo Edison Company* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 6th day of January, 2017, via electronic transmission.

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