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

I. INTRODUCTION

The Building Owners and Managers Association of Greater Cleveland ("BOMA Cleveland") and the Building Owners and Managers Association of Ohio ("BOMA Ohio," collectively "BOMA") jointly submit these Joint Comments in response to the Public Utilities Commission of Ohio's ("Commission" or "PUCO") December 7, 2016 Finding and Order ("Order") requesting comments and reply comments "regarding the reasonable threshold percentage to establish the rebuttable presumption for which the provision of utility service is *not* ancillary to the landlord's or other entity's primary business." Order at 11-12.

BOMA Ohio is a professional trade organization representing the six local BOMA associations located in Akron, Cincinnati, Cleveland, Columbus, Dayton, and Toledo. Together they represent commercial property owners that lease over 182 million square feet of office space throughout Ohio. BOMA Ohio estimates its collective electricity usage to be over 2.8 trillion kWh. BOMA Ohio contributes $5.67 billion to the state economy and supports over 46,500 jobs. BOMA Cleveland represents nearly 40 million square feet of office space in the greater Cleveland area that houses more than 2,000 companies with existing lease arrangements.

Many of BOMA's members are parties to existing lease agreements that contain terms that address submetering or reselling/redistributing of utility services. The Ohio Supreme Court has

held that these types of agreements between landlords and tenants are lawful. Further, these commercial lease agreements are the result of negotiations between sophisticated parties, and are not subject to the Commission's jurisdiction. The Commission's attempt to regulate the terms of these lease agreements by creating a "reasonable threshold percentage" is unlawful under Ohio law and departs from decades of Commission precedent. The Commission should either abandon the "threshold percentage" concept or clarify that it will not be applied to commercial landlords.

If the Commission decides to apply the "threshold percentage" to commercial landlords, the Commission should adopt a percentage high enough to account for the costs many commercial landlords incur while maintaining and operating their internal utility systems. Because of the complexity and variety in commercial buildings throughout the State, it is impossible to create a uniform percentage that can be fairly applied to all commercial buildings. As such, the Commission should liberally apply a high threshold percentage to commercial landlords. Applying an unreasonably low threshold on commercial building owners will have serious negative economic consequences on commercial building owners and commercial landlords throughout Ohio, interfering with the terms of existing commercial lease agreements.

II. COMMENTS

A. The Commission's attempt to regulate existing reselling, redistributing and submetering arrangements between commercial landlords and tenants violates Ohio Supreme Court and Commission precedent.

The Ohio Supreme Court has made it clear that landlords that resell, redistribute, or submeter are considered consumers of the public utility serving their properties. As far back as 1928, the Court held that a landlord that submeters electricity to its tenant is not a regulated public utility. *Jonas v. Swetland*, 119 Ohio St. 12 (1928). The Court again addressed the rights of landlords to submeter in *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1, 4, 208 N.E.2d 923 (1965), where the Court held that office buildings, apartment houses, and shopping

centers that submeter electricity to tenants are considered "customers" of the public utility. In *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶ 10 ("FirstEnergy"), the Court reaffirmed its decision from *Shopping Centers,* holding that landlords and tenants have the right to "enter into lease agreements that appoint the landlord to secure, resell, and redistribute electric service to its tenants." The Court also reaffirmed this long-recognized principle in *Pledger v. Pub. Util. Comm*., 109 Ohio St. 3d 463, 2006-Ohio-2989, 849 N.E.2d 14.

Based on this precedent, electric distribution utilities ("EDUs") developed tariffs which address the right of landlords to resell or redistribute utility service to tenants. For example, The Cleveland Electric Illuminating Company's tariff (P.U.C.O. No. 13 Original Sheet 4, page 10 of 21, Electric Service Requirements), provides as follows:

> C. Resale:
>
> 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 Commission has approved such tariffs, and wisely avoided inserting itself into the landlord/tenant relationship. This has been especially true with respect to commercial leases, where the Commission has consistently refused to second-guess the terms of agreements between landlords and tenants. *In re Brooks, et al. v. Toledo Edison Co*., Case No. 94-1987, 1996 Ohio PUC LEXIS 292, Opinion and Order, *36 (May 8, 1996) ("[T]his Commission is ill-equipped to insert itself as an arbiter of landlord/tenant disputes given our limited resources and statutorily-restricted enforcement powers."); *In re Toledo Premium Yogurt, Inc*., Case No. 91-1528-EL-CSS,

1992 Ohio PUC LEXIS 850, Entry, *7 (September 17, 1992) ("[The complainant] seeks to extend our jurisdiction beyond the utility/customer relationship and employ the Commission as an arbiter of landlord-tenant disputes. We cannot agree. Pursuant to Sections 4905.04 and 4905.05, Revised Code, we find that the Commission lacks jurisdiction over the landlords and the claims against them."); and *In re Nader*, Case No. 99-475-EL-CSS, 1999 Ohio PUC LEXIS 188, Entry, *2 (August 26, 1999). Further, the Commission has consistently determined that it has no authority to determine the reasonableness of utility service charges of a landlord unless the Commission first determines that the landlord is acting as a public utility. *In re Complaints of Inscho v. Shroyer's Mobile Homes*, PUCO Case Nos. 90-182-WS-CSS, 1990 Ohio PUC LEXIS 966, Opinion and Order, (Feb. 27, 1992) ("*Shroyer*").

The Commission is now inserting itself into pre-existing commercial landlord/tenant relationships by attempting to determine a "reasonable" submetering charge. The Commission is seeking comments "regarding the reasonable threshold percentage to establish the rebuttable presumption for which the provision of utility service is *not* ancillary to the landlord's or other entity's primary business." Order at 11-12. Because the Commission found that only one prong of the *Shroyer* test needs to be established for an entity to be considered a "public utility," Order at 10-11, a landlord might be considered a "public utility" simply because its charges exceed this "threshold percentage." This will ultimately result in the Commission second-guessing existing contractual agreements between commercial landlords and tenants no matter what "threshold percentage" the Commission chooses.

Further, the Commission's narrow focus on the amount landlords are charging as the determining indicator of "public utility" status departs from Ohio Supreme Court precedent. The Ohio Supreme Court has held that a number of factors must be considered when determining if an entity is a "public utility." *A & B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64

Ohio St.3d 385, 387, 596 N.E.2d 423 (1992). The Commission must examine the nature of the business in which an entity is engaged before it can determine if an entity is a public utility. *Indus. Gas Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 21 N.E.2d 166 (1939), paragraph one of the syllabus. In *A&B Refuse*, the Court held that the determination of whether a particular entity is a public utility "requires a consideration of several factors related to the 'public service' and 'public concern' characteristics of a public utility." *A&B Refuse*, 64 Ohio St.3d at 389. Further, the Court stated that no one factor is controlling. *Id*. By creating a test that focuses solely on the amount a landlord is charging, the Commission is violating the holding of *A & B Refuse*.

The Commission has no jurisdiction to question the reasonableness of the terms of commercial landlord/tenant lease agreements. Further, the Court has determined that submetering arrangements between such landlords and tenants are lawful. As such, the Commission has no legal basis for suddenly attempting to extend its jurisdiction over these business contracts, especially within context of commercial leases where there have been no allegations of submetering abuse. As such, the creation of a "threshold percentage" as a mechanism of determining the "reasonableness" of a submetering charge violates Ohio Supreme Court precedent and upends the Commission's the current regulatory framework which BOMA members relied on for the last half-century.

B. The "threshold percentage" should not apply to commercial landlords.

If the Commission chooses to create a "threshold percentage" to determine the "reasonableness" of certain submetering charges or charges for reselling/redistributing utility services, the Order should not be applied in the context of commercial leases and commercial landlords should be exempt from the Commission's jurisdiction. There has been no allegation that submetering abuses exist in the commercial leasing context. BOMA represents commercial

property owners that lease over 182,000,000 square feet of office space throughout Ohio. These commercial leases are the result of serious negotiations between sophisticated parties.

BOMA is not the only party seeking to limit the Order to the residential context. The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Poverty Law Center ("OPLC") supported limiting the Commission's regulation of submetering to the residential context by stating:

> Commercial and industrial customers have far more bargaining power than the average residential customer and thus are less susceptible to abusive practices arising from submetering arrangements. **For those reasons, OCC/OPLC supports limiting the PUCO's regulation over submetering to residential customers.**

OCC/OPLC Reply Comments at footnote 1. (emphasis added)

In addition, OCC/OPLC argue in their application for rehearing that the Commission "should have limited the application of its Order to those submeterers that resell and redistribute public utility service to residential customers." OCC/OPLC Application for Rehearing at 10. OCC/OPLC correctly note that applying the Order to commercial and industrial landlords presents a "multitude of questions" that will greatly complicate the Commission's efforts to address potential submetering abuses that may negatively affect residential customers. *Id.*

One of the key differences between commercial and residential leasing is the high level of complexity involved with many commercial lease arrangements. When parties negotiate commercial lease agreements, they consider a myriad of factors regarding the potential costs and value of a leasable unit. One of these factors is access to and the cost of utility service. In many commercial buildings throughout Ohio, submetering or reselling of utility service is a necessity because the buildings are not constructed to provide a direct public utility connection to each individual leasable unit within a structure. For example, many BOMA Cleveland members own office buildings in downtown Cleveland that were constructed more than fifty (50) years ago. The

electrical systems in many of these older buildings will not accommodate individual meters for tenants even if the landlord – or utility – wishes to install them.

Even if installing a direct public utility connection is possible for some landlords, they will spend substantial amounts of money on reconfiguring their buildings. One example is the potential cost of installing or rerouting wires to accommodate each EDUs' particular metering requirements. EDUs usually require that all of their meters be located in one designated area, which is typically in the lower level of a commercial building. If commercial building owners are forced to install direct connections for each unit, many commercial building owners will have to install electrical wires from each unit to the designated metering location. The cost associated with such a massive installation project would be exceptionally burdensome in large commercial buildings, where the installation of wiring would be required in hundreds of units on dozens of different floors. In addition, many commercial landlords have incurred substantial costs installing and maintaining their current submetering systems, which they installed while relying upon Ohio Supreme Court and Commission precedent. Commercial landlords have incurred capital costs and installation costs related to meters, wiring, and automated meter reading software. These commercial landlords will be deprived of their significant investments if they are suddenly forced to reconfigure their utility infrastructure to accommodate direct public utility connections to each unit.

Commercial landlords also incur costs to operate and maintain the utility systems which are within their buildings and need to assess fees to recover their expenses in providing utilities to their tenants. Commercial tenants that agree to these charges weigh a number of factors before entering into lease agreements, such as location, the size and design of the unit, whether the unit serves the tenant's particular business needs, and the overall costs of leasing the unit. Commercial lease agreements result from intensive negotiations between sophisticated parties who understand

what best serves their business needs. The Commission should not insert itself into these negotiations and should not interrupt business decisions between sophisticated commercial parties. Further, in many commercial lease agreements, landlords bundle utility charges with rent or lease payments rather install individual submeters on all of their tenants' units. The only way for the Commission to determine the "reasonableness" of bundled charges for utility services would be to literally deconstruct the terms of these commercial lease agreements and determine a "reasonable" charge per square foot based on each particular unit. This would necessarily require a determination of the fair market lease value of the real estate for each individually leased unit. Such a task goes well beyond the Commission's statutory jurisdiction, and would be an administrative nightmare for the Commission to implement.

In addition, applying a uniform "threshold percentage" to all commercial landlord/tenant submetering arrangements is unreasonable and unworkable because of the substantial differences between commercial buildings throughout the State. The costs each particular commercial landlord incurs to operate and maintain its internal utility infrastructure will differ greatly across the board based on the age, size, infrastructure, utility connections, and design of each particular building. Further, while the units in a particular residential building often are the same or very similar design, the units within individual commercial buildings very often differ in size and configuration. Commercial buildings that appear similar from the outside may be strikingly different on the inside and have entirely different utility system configurations. In addition, how each tenant uses its unit can vary greatly from unit to unit in commercial buildings, which can often result in different tenants having substantially different utility usage levels. To accommodate the business needs of new tenants, commercial landlords will often have to reconfigure the unit, which may require a rewiring of the entire unit. Commercial landlords that submeter also incur substantial administrative costs regarding the current submetering systems. These landlords incur

costs reading meters, obtaining information regarding the local public utilities' rates, calculating tenants' charges based on usage and an allocation of infrastructure costs, and preparing invoices for tenants.

The Commission's decision to regulate the terms of commercial lease agreements will have a substantially negative effect on commercial building owners and landlords. For many building owners, the complexities of the infrastructure of their buildings make it financially and physically impossible to provide direct connections to the local public utility. To avoid potentially being considered "public utilities," commercial landlords throughout the State could be forced to spend potentially millions of dollars modifying their internal utility infrastructure systems. These capital expenditures, which could be used for constructing new buildings or investments in energy efficiency projects, will instead be diverted to avoiding the burdens resulting from the Commission's Order. This undoubtedly would have a chilling effect on commercial real estate development throughout Ohio.

C. Any "threshold percentage" applied to commercial landlords must recognize the costs these landlords incur to operate and maintain their internal utility systems.

If the Commission chooses to subject all landlords to the "threshold percentage", the Commission should ensure that the applicable threshold is higher for commercial landlords. As discussed above, commercial buildings present many existing infrastructural complexities that are uncommon in the residential context. Further, due to the substantial differences between commercial buildings throughout the State, it is impossible to develop a "one size fits all" threshold percentage in a just and reasonable manner. A simple comparison of the default utility's rates to the utility charges assessed by landlords is not adequate because commercial landlords incur substantial costs in maintaining their internal utility system, which could differ markedly from building to building. For many commercial building owners, utility costs represent a quarter

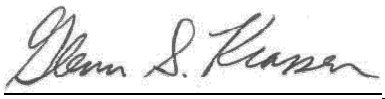
of their building operating expenses. Commercial landlords have a right to recover these operational costs from their tenants, and the Commission should avoid creating a system where landlords are afraid to incorporate these costs into their lease arrangements. An unduly burdensome "threshold percentage" may lead to a decrease or elimination of utility service charges, but it will also result in an increase in rent or lease payment amounts. Of course, landlords will have to recover their operating costs from somewhere.

Because there has been no allegation of submetering abuse in the commercial leasing context, the Commission should establish a high threshold percentage for commercial landlords. This percentage should be at least 130% of the utility's price-to-compare, which would include all components of the end-users' bill (e.g., a customer charge, distribution, transmission, and generation for electric service). Further, the utility price-to-compare should be calculated based on an annual weighted average basis, rather than a monthly basis. This structure would ensure that commercial landlords that incur higher operational and maintenance costs due to the particular design, age, or location of their internal utility systems will not be unreasonably affected by the Commission's application of the "threshold percentage" to their existing lease agreements.

III. CONCLUSION

BOMA requests that Commission carefully consider the negative implications of applying a "threshold percentage" to commercial landlords and clarify that commercial landlords are exempt from its application. This methodology not only presents serious legal concerns, but also it will interfere with existing commercial lease agreements and potentially result in substantial and material costs for many commercial landlords throughout Ohio. BOMA believes that the Commission should abandon the "threshold percentage" completely. However, if the Commission decides to proceed forward with this methodology, it should do so in a manner that ensures commercial landlords are not unjustly affected.

Respectfully submitted,



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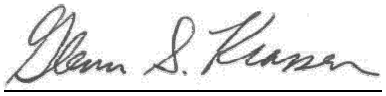
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Joint Comments was served upon the parties of record listed below this 13th day of January 2017 *via* electronic mail.



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Summary: Comments of Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio electronically filed by Teresa Orahood on behalf of Glenn S. Krassen