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 MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF GREATER CLEVELAND AND THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF OHIO

I. INTRODUCTION

Pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-35, 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 its Memorandum Contra Application for Rehearing filed by Ohio Power Company, Duke Energy Ohio, Inc., and Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively "EDUs") on January 6, 2017.

II. LAW AND ARGUMENT

A. The EDUs' requested modification to the "rebuttable presumption" test would violate established Ohio Supreme Court precedent by precluding all commercial landlords from submetering utilities or reselling utilities to their tenants.

The EDUs propose that the "rebuttable presumption" established by the Order be modified to create a presumption that any landlord - including commercial landlords - that charges its tenants a price above what the landlord pays for the utility service is a "public utility." EDUs Application for Rehearing at 2. This proposal would terminate commercial landlords' ability to enter into submetering and reselling arrangements with their tenants. Importantly, this would violate well-established Ohio Supreme Court precedent which states that landlords have

the right to enter into submetering arrangements with their tenants. *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶ 10 (The Court held 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."); *Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶ 38 ("[W]e hold that the landlord is the consumer of these services, even though it resold the services."); *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1, 4, 208 N.E.2d 923 (1965) (the Court held that office buildings, apartment houses, and shopping centers that submeter electricity to tenants are considered "customers" of the public utility); and *Jonas v. Swetland*, 119 Ohio St. 12 (1928).

The Court has established that landlords are "customers" of the public utility and have the right to resell utility services to their tenants. Commercial landlords and tenants incorporate terms into their lease agreements that address the reselling of utilities. These arrangements often involve bundling utility service charges and lease payments together. Contrary to the EDUs' arguments, commercial landlords do not resell utility service for "profit." Commercial landlords enter into utility reselling arrangements to recover the substantial costs they incur installing, maintaining, and operating their internal utility infrastructure. BOMA Comments (January 13, 2017) at 8-9. The amounts commercial landlords pay their local public utilities do not recognize any of these costs.

For example, commercial landlords often have to reconfigure or install new wiring when a new tenant leases a unit. This is because commercial tenants' use of their units will vary greatly from tenant to tenant based on each tenant's particular business. In addition, the cost 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. For many commercial building owners, utility costs represent a quarter of their operating expenses. Commercial landlords have a right to recover these operational costs from their tenants.

The Commission should deny the EDUs' request to interfere with existing commercial lease agreements which were negotiated between sophisticated parties. A complete elimination of all submetering arrangements (which is what the EDUs' proposal would lead to for commercial landlords) would have a tremendously negative effect on the commercial real estate industry throughout Ohio. Further, although the record contains no allegations of submetering abuse by commercial landlords, the EDUs fail to limit their proposal to only those entities submetering utilities to residential customers. BOMA has extensively discussed the substantial infrastructural and financial challenges commercial landlords will face if they are suddenly forced to provide for direct utility connections in all of their units. BOMA Application for Rehearing at 9; BOMA Comments (January 13, 2017) at 6-7. It would be unjust and unreasonable for the Commission to grant the EDUs' request without considering the financial harm it will cause commercial landlords.

The EDUs admit they will have to "install new infrastructure or take over infrastructure that was installed by landlords or submetering companies" if their proposal is adopted. EDUs Application for Rehearing at 12. Not only would the EDUs "take over" commercial landlords' internal utility infrastructure under their proposal, but they would also impair thousands of existing contracts between commercial landlords and tenants throughout Ohio. The Commission should reject the EDUs' unlawful and unreasonable request.

B. The Commission should grant OCC/OPLC's request to limit the scope of the Order to entities that are submetering utilities or reselling utilities to residential customers.

In their fourth assignment of error[1], the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Poverty Law Center ("OPLC") request that the Commission limit the applicability of the Order to submeterers that resell and redistribute public utility services to residential customers. BOMA agrees with OCC/OPLC's request, which is consistent with BOMA's Application for Rehearing. BOMA Application for Rehearing at 8-10. This investigation was the result of alleged submetering abuses in the residential context. There have been no allegations of submetering abuses by commercial landlords. Further, commercial lease agreements are the result of negotiations between sophisticated parties. There is simply no legal or record support for the Commission extending its jurisdiction over the terms of existing commercial lease agreements. It is critical that the Commission clarify that the Order applies to only those entities that resell or redistribute public utility services to residential customers. This is especially true considering that the EDUs propose a modification to the "rebuttable presumption" that will end all submetering throughout Ohio, including submetering by commercial landlords.

III. CONCLUSION

BOMA requests that the Commission reject the EDUs' application for rehearing and grant rehearing to clarify that the Order does not apply to commercial landlords.

[1] BOMA is not addressing OCC/OPLC's assignments of error 1, 2, 3, 5 or 6 because the modifications to the Order OCC/OPLC proposed in these assignments of error would not impact commercial landlords if the Commission clarifies that the Order does not apply to commercial landlords. BOMA's silence on OCC/OPLC's assignments of error 1,2,3,5, and 6 does not constitute an agreement with those assignments of error and BOMA reserves the right to challenge any potential modification to the Order that affects its members' interest.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Joint Application for Rehearing was served upon the parties of record listed below this 17th day of January 2017 *via* electronic mail.

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Summary: Memorandum BOMA Memo Contra Application for Rehearing electronically filed by Mr. Devin D. Parram on behalf of BOMA Cleveland