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

MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO APPLICATIONS FOR REHEARING

I. INTRODUCTION

This proceeding involves the Public Utilities Commission of Ohio ("Commission") efforts to address issues related to the resale and redistribution of electric utility service through submetering. On December 15, 2015, the Commission initiated an investigation regarding the proper regulatory framework to be applied to submetering and condominium associations in the state of Ohio. The Commission received initial and reply comments from numerous stakeholders representing a wide range of interests. On December 7, 2016, the Commission issued its Finding and Order in this investigation, expanding application of the *Shroyer Test* to condominium associations, submetering companies, and other entities. The Commission further created new parameters for application of the *Shroyer Test* to determine if those entities are acting as a public utility when they resell or redistribute utility services. Additionally, the Commission clarified that failure of any one of the three prongs of the *Shroyer Test* is sufficient to demonstrate that an entity is unlawfully operating as a public utility.

On January 6, 2017, various parties filed Applications for Rehearing setting forth a number of arguments with respect to the Commission's Finding and Order. Applications for Rehearing

are governed by Section 4903.10, Ohio Revised Code ("O.R.C") and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."). Under those authorities, applications for rehearing are to be granted only where a Commission order is "unreasonable," "unlawful," or "unjust or unwarranted." Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "Companies") hereby file their Memorandum Contra to applications for rehearing regarding certain issues as detailed herein. As it relates to the issues addressed in this Memorandum Contra,[1] the Order is not "unreasonable," "unlawful," or "unjust or unwarranted." As indicated below, the other parties' applications for rehearing fail to meet those standards. Thus, the Commission should deny rehearing on these issues.

II. THE COMMISSION SHOULD CLARIFY THAT THE MODIFIED *SHROYER TEST* APPLIES ONLY WHEN A SUBMETERING ENTITY SEPARATELY BILLS AN END-USE CONSUMER BASED ON THE CONSUMER'S ACTUAL USAGE OR A PROXY DESIGNED TO ESTIMATE THEIR ACTUAL USAGE.

The Companies note that several parties filing applications for rehearing, such as Nationwide Energy Partners ("NEP"), the Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio ("BOMA") and the Industrial Energy Users-Ohio, Ohio Hospital Association, and Ohio Manufacturers' Association ("IEU") argue the Commission's Order violates existing laws regulating landlord/tenant leases and is therefore unlawful.[2] Whether or not Ohio law precludes the Commission from interpreting the statutory definition of a public utility with respect to landlords and tenants located on contiguous

[1] Failure by the Companies to address any particular issue raised in an Application for Rehearing of any party should not be construed as agreeing with that party's arguments. The Companies reserve their right to all procedural due process under Ohio law.

[2] *See*, for example, NEP ("the Commission has repeatedly found that Ohio's statutory scheme deprives it of jurisdiction over submetering arrangements by landlords and similarly situated persons." p. 10; BOMA ("this extension of the Commission's jurisdiction is unlawful and unreasonable considering Ohio Supreme Court precedent which states that landlords and tenants have the right to enter into submetering arrangements." p. 5-6); and IEU ("no Commission intervention has ever been recognized or warranted because they are voluntary arrangements between sophisticated parties." p. 12-13).

property owned by the landlord, the Companies believe the various applications for rehearing suggest a need to clarify the scope of "submetering" being addressed in this investigation. Specifically, it is not clear if the term "submetering" as used in the Finding and Order means all instances where the ultimate consumer is not directly paying the public utility, including where utility services are included within a lease or rental payment, or if the term "submetering" refers only an entity's distinct charge for delivery of utility services that were originally procured from a public utility. Clarification of the use of this term may resolve issues that have been raised on rehearing.[3]

The Companies submit there is a logical and practical distinction, consistent with the Joint Application and the Companies' tariffs, between a lease agreement with rent that includes utilities and a lease agreement with separate charges for utility services based on the end-use consumer's usage or a proxy designed to estimate their actual usage.[4] In the former instance, a landlord and a tenant presumably reach an agreement upfront that discloses the price of the lease so the tenant knows how utilities are accounted for in the lease payment. At lease renewal, both parties evaluate the arrangement and act accordingly. Assuming knowledgeable parties to such a lease agreement, it is not likely for the landlord, through business model design, to earn a profit on utility services as various factors such as appliances, weather, and changes in public utility rates may cause actual

[3] This issue is perhaps best articulated by BOMA in its Application for Rehearing when it states: "Some landlords, in accordance with their lease agreements, bundle utility charges into the rent payment, but don't actually engage in 'submetering'. It is unclear how the Commission will determine the reasonableness of bundled rent payments without deconstructing the terms of existing lease agreements." (BOMA, p. 6-7). The Commission can resolve this issue by clarifying that it does not intend to dissect "bundled rent payments" but, rather, to only apply the modified *Shroyer Test* to entities that charge end-use consumers based on their actual electric usage or a proxy designed to estimate their actual usage.

[4] The Companies' discussion in this application is limited to landlord/tenant arrangements on property owned by the landlord consistent with existing approved tariff, which will prohibit resale of electric service by a landlord if the Commission makes a determination that the landlord fails any prong of the *Shroyer Test*.

utility costs to be more or less than the estimates included in the lease agreement. Under the Companies' Joint Application, this scenario does not fail the third prong of the *Shroyer Test*.

In contrast, "submetering" to an end consumer that involves separate charges for utility services provides more opportunity to include a designed profit margin, where the submetering entity, whether or not the customer of record at the public utility meter,[5] always earns a profit on redelivered utility services. This profit margin business model signifies an intent to engage in the business of supplying electricity. The Companies believe a clarification and distinction between embedded and separate charges is warranted to avoid the need to dissect rent payments to assess the fairness of the utility charges. This distinction may also help reduce the volume and complexity of complaint investigations.

III. OCC'S ASSIGNMENT OF ERROR NO. 3 SHOULD BE DENIED.

The Commission did not err by declining to require electric distribution utilities to adopt and enforce tariff provisions designed to shift the burden of regulating unlawful submetering arrangements to utilities. In their application for rehearing, the Ohio Consumers' Counsel and the Ohio Poverty Law Center ("OCC") state: "The PUCO can put an end to abusive practices and protect consumer interests by requiring the public utilities to restrict the resale of their services (through their tariffs) and then enforce the tariffs." (OCC at p.9). OCC argues that such tariff provisions "will protect against future violations of Ohio law and will reduce the number of complaints before the PUCO." (*Id.*) OCC further argues that "[a]t the very least, if resale and redistribution is permitted through the public utilities' tariffs, it should only be permitted with no mark up from the cost charged to the submeterer." While the OCC's aims are admirable, the

[5] No matter who is considered the public utility's customer, a resale to the end consumer of electric distribution services originally delivered by the public utility has occurred.

adoption and enforcement of such tariff provisions as those envisioned by OCC are both unnecessary as described below.

The Companies' Commission-approved tariffs[6] already restrict the resale and redistribution of electricity except in landlord/tenant arrangements where the landlord owns the contiguous subject property to which electric services are being delivered. Further, the Companies' longstanding tariffs limit this exception to circumstances where the landlord is not otherwise operating as a public utility, thus successfully mitigating issues associated with resale and redistribution of electric service in the Companies' service territories. Accordingly, the Companies' tariff is already consistent with application of the modified *Shroyer Test* and no additional responsibilities should be shifted to the utilities. As such, the OCC's requested third assignment of error should not be applied to the Companies. Any expansion of the Companies' tariff responsibilities ordered by the Commission beyond the existing provisions should receive timely recovery of all incremental costs incurred.

III. CONCLUSION

For all of the foregoing reasons the Commission should clarify its definition of submetering as outlined above, and should deny the OCC's third assignment of error.

[6] The Companies' existing Commission-approved tariffs for Electric Service Regulations generally prohibit the reselling of electric service through submetering of electric service in Section VIII (C), which states:

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).

Respectfully submitted,

/s/ Joshua R. Eckert
Joshua R. Eckert (#0095715)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Telephone: 330-384-5849
Fax: 330-384-3879
jeckert@firstenergycorp.com

Attorney for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

CERTIFICATE OF SERVICE

I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 17th day of January, 2017. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ *Robert M. Endris*
Robert M. Endris

Summary: Memorandum Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company of Applications for Rehearing electronically filed by Mr. Robert M. Endris on behalf of Eckert, Joshua R