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
OHIO POWER COMPANY AND
DUKE ENERGY OHIO, INC.

As described in multiple filings in this docket, 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. *See, e.g.*, Initial Comments of AEP Ohio and Duke Energy Ohio, Inc. (Jan. 21, 2016) at 2-16. Therefore, Ohio Power Company ("AEP Ohio") and Duke Energy Ohio, Inc. ("Duke") continue to maintain that submetering practices should be prohibited to the greatest extent possible.

AEP Ohio and Duke again commend the Commission for taking an initial step in its December 7, 2016 Finding and Order ("Finding and Order") to bring submetering arrangements within its jurisdiction. However, as AEP Ohio, Duke, and the FirstEnergy Companies (collectively "Joint Applicants") explained in their January 6, 2017 Application for Rehearing ("Joint AFR"), the "rebuttable presumption" established in the Finding and Order may have little effect on current submetering practices. Under the Commission's test – which would apply the rebuttable presumption only if a submetering entity "charges an end use customer a threshold percentage *above* the total bill charges for a similarly situated [utility] customer," Finding and Order at 9 (emphasis added) – submetering entities will be able to continue to earn considerable profit (as much as 45%) while escaping regulation as a public utility. *See* Joint AFR at 7.

Now, following the initial round of comments requested by the Commission, Joint Applicants' concerns with the Finding and Order have been confirmed: Nationwide Energy Partners ("NEP") has proposed in its initial comments that the "threshold percentage" to apply the rebuttable presumption be set at "zero percent" above the utility's standard offer rate. NEP Initial Comments at 4. This proves that the Commission's test is unlikely to have any effect on the submetering status quo, since by their own admission, submetering entities like NEP will be able to continue their business model (and earn substantial profit) by charging only the standard service offer rate and thereby escaping regulation as a public utility.

Accordingly, as discussed below and in the Joint AFR, the Commission should adopt the Joint Applicants' proposed revision to the rebuttable presumption: That is, the Commission should hold that a submetering entity unlawfully acts as a "public utility" whenever it resells electric service at a markup. Joint Applicants' proposed approach is not only more closely aligned with the relevant statute, which focuses on whether an entity is "engaged in the *business* of" – i.e., making a *profit* from – supplying utility service. *See* R.C. 4905.03(C) (emphasis added). But Joint Applicants' approach is also the only way to curb submetering and bring an end to the many harms that submetering causes customers.

I. By requesting that the "threshold percentage" be set at "zero percent," NEP's comments prove that the Commission's reformulated test will have little effect on current submetering practices, because it will allow submetering entities to continue to make substantial profit while escaping regulation as a public utility.

In the Commission's Finding and Order in this proceeding, it proposed a rebuttable presumption that a submetering entity is a "public utility" under the third prong of the *Shroyer Test* if it "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, [such as] an electric utility's standard service offer." Finding and Order at 9. In their Application for Rehearing, the Joint

Applicants argued that this proposed test is flawed because it would have little effect on submetering. Specifically, it would allow submetering entities to continue earn considerable profit – as much as a 45% profit margin – while escaping regulation as a public utility. *See* Joint AFR at 7.

In its Memorandum Contra Rehearing, NEP claimed that Joint Applicants' 45% profit margin calculation was "misleading," but NEP provided absolutely no support for this claim. NEP asserted that it was "[i]gnoring the accuracy of the calculations and underlying numbers," but NEP failed to offer any specific reason why Joint Applicants' "calculations" or "numbers" were wrong. *See* NEP Memo Contra at 4. That is because the calculations were correct – Joint Applicants' detailed and explicit example was based on easily verifiable rates from AEP Ohio's publically filed tariffs. Joint Applicants' "calculations," furthermore, were simple mathematics that were clearly set out in their Application for Rehearing. *See* Joint AFR at 7. If NEP believed any of these numbers or calculations were inaccurate, as NEP insinuated in its Memorandum Contra (at 4), NEP easily could have explained *why* it believed they were inaccurate. By failing to do so, NEP effectively conceded that the 45% profit margin calculation was correct.

Furthermore, NEP claimed that the 45% profit margin figure left out "deductions from gross revenues such as managing/maintaining utilities for a 100-apartment complex." NEP Memo Contra at 4. NEP further quipped: "Indeed, the Commission need only ask itself, when have the Utilities ever requested that the Commission review their earnings on a no-expense basis?" NEP Memo Contra at 4.

In this response, NEP only proves Joint Applicants' point: By analogizing itself to "the Utilities" who include "expenses" in their residential rates, NEP is conceding that *it performs the same role as AEP Ohio, Duke, and FirstEnergy*. That is, it is "engaged in the business of

supplying electricity for light, heat, or power purposes to consumers within this state." R.C. 4905.03(C). NEP naturally has "expenses" in engaging in this business, yet, through its filings in this docket, it seeks to recover those expenses, plus considerable profit, while escaping regulation as a public utility.

Critically, moreover, NEP's analogy overlooks the fact that, by escaping regulation as a public utility, NEP avoids many of the "expenses" that go into a public utility's rates. For instance, because it is not regulated as a public utility, NEP avoids expenses related to regulations concerning quality of service and disconnection, Commission oversight and rate regulation, and programs such as low-income assistance and energy efficiency measures, just to name a few. Further, it is notable that while claiming it has "expenses," NEP makes no effort to explain what those expenses relate to, or how much they are. *See* NEP Memo Contra at 4. That is no doubt because the "expenses" NEP claims barely make a dent in the 45% profit margin NEP can make in the "delta" between master meter rates and residential SSO rates. Ultimately, the debate of whether the submetering companies will make 40%, 45%, or 50% profit cannot be definitively resolved – but the cogent point is that submetering companies are operating unlawfully in a regulatory system that did not envision unregulated monopoly providers. And if there were any doubt that the Commission's proposed test is unlikely to have any effect on NEP and other submetering entities, it was resolved by NEP's initial comments in this proceeding, which, remarkably, proposed that the "threshold percentage" be set at "zero percent." NEP Initial Comments at 4. NEP admitted in its comments that it "has consistently applied the utility's residential rates (i.e. electric standard service offer) to the metered usage charges for the end-users at their properties." *Id.*

These comments forcefully demonstrate that the Commission's proposed test will allow NEP and other entities to continue to stay in business – and to make substantial profit – while escaping regulation as a public utility. By admitting that it already charges the utility's SSO rate, NEP confirms the analysis in the Joint Application for Rehearing that showed that basing the "rebuttable presumption" on the utility's SSO rate will allow submetering companies to continue to earn a considerable profit while escaping regulation as a public utility. The Commission's reformulated test, therefore, is fully consistent with NEP's *current* business model. Thus, the proposed test will have little or no effect on the status quo. It will neither curb the proliferation of submetering nor eliminate the many harms to customers that submetering causes.

Accordingly, the Commission should adopt the Joint Applicants' proposed revision to the rebuttable presumption, as discussed immediately below. *See infra* Part II. That is the only way to curb submetering and bring an end to the many harms that submetering causes customers.

II. The Commission should adopt the test advocated by the Joint Applicants: It should hold that a submetering entity unlawfully acts as a "public utility" whenever it resells electric service at a markup.

By confirming Joint Applicants' analysis in their Application for Rehearing, NEP's comments also demonstrate that the best approach to limiting submetering and its many harms is to adopt the revised test proposed in the Joint AFR: The Commission should find that a submetering entity is a "public utility" whenever it 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. *See* Joint AFR at 8-12. Because it would violate the Certified Territories Act (R.C. 4933.81 *et seq*.) for submetering companies to conduct business as a public utility, such actions are unlawful and should be prohibited.

This "no markup" approach more closely accords with the relevant statutes. Some commenters have questioned the statutory basis for this proposed test. But the Joint Applicants'

proposed test is straightforwardly based on the plain meaning of the text of the statute: 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 such as NEP 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 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."

Moreover, as the Residential Advocates[1] point out, the test proposed by Joint Applicants is supported by the practices of other jurisdictions. The Residential Advocates note that other jurisdictions have adopted precisely the test AEP Ohio and Duke have advocated by requiring that landlords merely pass on master meter charges without markup to individual tenants. *See* Residential Advocates Comments at 7. These examples from other jurisdictions confirm that Joint Applicants' proposed test is sound policy and easily administered. It should be adopted here.

III. Neither the Commission's rebuttable presumption nor the reformulation advocated by Joint Applicants is at odds with Supreme Court precedent.

Several parties claim that the Commission's new rebuttable presumption violates Ohio Supreme Court case law. *See, e.g.*, IEU/OHA/OMA Comments at 4; Building Owners Comments at 2; AP&L Comments at 1. In the view of these parties, the *Shroyer Test* can never be changed because it has been irrevocably ensconced by the Supreme Court. That view,

[1] "Residential Advocates" refers to the joint filing of the Coalition on Homeless and Housing in Ohio, the Legal Aid Society of Southwest Ohio LLC, the Edgemont Neighborhood Coalition, the Office of the Ohio Consumers' Counsel, and the Ohio Poverty Law Center.

however, finds no support in the precedent these parties cite, as the Joint Applicants explained before. *See* Reply Comments of AEP Ohio and Duke (Feb. 5, 2016) at 3-9. Most importantly, in *Pledger v. Pub. Utils. Comm'n of Ohio*, 109 Ohio St. 3d 463, 2006-Ohio-2989, the Supreme Court expressly recognized that "[s]omething more than the words of the statute is needed" in the context of submetering, and it is *the Commission's* responsibility to fill that gap. Therefore, just as the Commission created the *Shroyer* test to provide the "[s]omething more" needed to implement the statute, the Commission may alter or amend its approach as the flaws with the *Shroyer* test become apparent. Thus, far from foreclosing the Commission's rebuttable presumption – or the reformulation of that presumption proposed by Joint Applicants – *Pledger* confirms that the Supreme Court has given the Commission discretion to interpret R.C. 4905.03 in the manner that the Commission, in its expert judgment, deems best.

Moreover, the Commission's rebuttable presumption – and Joint Applicants' reformulation – are consistent with two other cases many parties cite: *FirstEnergy Corp. v. Public Utilities Commission of Ohio*, 96 Ohio St. 3d 371, 2002-Ohio-4847, and *Shopping Centers Association v. Public Utilities Commission of Ohio*, 3 Ohio St. 2d 1 (1965). *FirstEnergy* and *Shopping Centers* held that "office buildings, apartment houses, and shopping centers are 'consumers' of electricity" under R.C. 4905.03 "even though these consumers may resell, redistribute, or submeter part of the electric energy to their tenants." *FirstEnergy*, 2002-Ohio-4847, ¶ 9; *Shopping Centers*, 3 Ohio St. 2d at syllabus ¶ 2 (same). But all that means is when a Commission-regulated utility such as AEP Ohio or Duke provides "master meter" service to a submetering landlord, the landlord is a "consumer" under R.C. 4905.03, and thus the Commission may regulate *the master meter service*. AEP Ohio and Duke do not challenge that holding – the Commission may regulate master meter service even when the service is then

resold through submetering. The critical difference here is that submetering companies are not acting within the landlord-tenant exception but are operating for profit as a public utility.

Finally, even if the Commission were to conclude that its rebuttable presumption (and Joint Applicants' reformulation) are in tension with Supreme Court case law (they are not, as discussed above), the Supreme Court would give deference to this Commission if it finds, in its expert judgment, that the previous decisions of the Court and the Commission should be revisited in light of changed circumstances and the Commission's new understanding of the substantial harms caused by submetering. As *Pledger* made clear, the Court gives "[d]ue deference . . . to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." 2006-Ohio-2989, ¶ 40. If the Commission were to determine that previous approaches to submetering were misguided and adopt a new approach that is consistent with the statutory definition of a public utility, the Supreme Court would defer to the Commission's judgment.

Indeed, the Commission can point to many changed circumstances that warrant revising previous approaches to submetering. The past several years have witnessed the formation of submetering companies such as NEP and American Power & Light whose business model is to exploit the lack of regulation over submetering and to extract profit from tenants. When the Supreme Court decided *Pledger*, *FirstEnergy*, and *Shopping Centers*, the Court did not address the dubious practices of these submetering companies. Rather, it appears that the Court was addressing the "traditional" model of submetering in which landlords merely allocate utility costs without markup.

Another reason for revisiting previous approaches to submetering is the recent public scrutiny of submetering and the improved understanding of all parties of the harms that

submetering can cause. Indeed, that was the Commission's ostensible purpose when it opened this investigation. Although *FirstEnergy* briefly addressed the fact that submetering customers cannot shop for competitive generation supply, *see* 2002-Ohio-4847, ¶ 10, none of the Court's previous cases fully engaged with the many harms of submetering identified in several parties initial comments – including, for example, that submetering rates are often hidden from submetered customers, that submetered customers have no right to be heard in the setting of their rates, that submetered customers have no protections surrounding rate disclosure or disconnection of service, and that submetered service can be unreliable.

In sum, where, as here, a test was created by the Commission to deal with one set of circumstances, that test can be revised by the Commission as circumstances change and the Commission gains more experience with the former test's shortcomings. That is precisely what the Commission has done here, and it is fully consistent with Ohio Supreme Court precedent.

IV. The Commission should not overlook the other factors of the *Shroyer Test* when evaluating whether submetering entities are "public utilities," especially when evaluating NEP's claim that it is merely an "agent" for landlords.

As requested by the Commission, these comments address the rebuttable presumption the Commission adopted for the third prong of the *Shroyer Test*. But it is important to keep in mind that the rebuttable presumption is merely a short hand or guide for the Commission to apply in individual cases. AEP Ohio and Duke agree with commenters who note that the determination of whether an entity is a public utility must be conducted on a case-by-case basis under the totality of the circumstances. But the case-by-case approach does not preclude the Commission from employing a rebuttable presumption to facilitate a practical application of the test.

As AEP Ohio and Duke have advocated, the touchstone of such an inquiry should be whether a submetering entity is making a profit by marking up utility service. But the other prongs of the *Shroyer Test* are also relevant, as well as potentially other factors, in determining

whether a submetering entity is "engaged in the business" of supplying electricity under R.C. 4905.03(C).

For instance, in evaluating whether NEP is a submetering entity, the Commission should regard with skepticism NEP's repeated claim that it is merely acting as an "agent" of a landlord or condominium complex. This claim should be subject to a full factual inquiry, but it is telling that NEP has never produced any evidence of this "agency" relationship. It has not, for example, produced any evidence that it takes direction from a landlord, that it remits funds collected to its alleged landlord or condominium "principals," or other indicia of an "agency" relationship. To the contrary, all indications in the record suggest that NEP operates wholly independently of the landlord or condominium association, purchasing electricity and reselling it under its own name and without any direction or other interaction from the alleged "principle." More importantly, it does not turn its substantial profits over to the landlord "principal."

Furthermore, as AEP Ohio and Duke have pointed out before, NEP frequently has "avail[ed] itself of special benefits available to public utilities" under the *Shroyer Test*. For instance, NEP's bills are clearly designed to imitate public utility bills and to give customers the impression that NEP is a public utility. NEP has even threatened disconnection of service – something a landlord is prohibited from doing under landlord/tenant law, but a public utility may do (subject to strict rules and oversight). In this way, NEP attempts to "avail itself of special benefits available to public utilities" without the required regulation.

In sum, although this comment process and the Commission's new rebuttable presumption are an important step toward regulating submetering and bringing an end to its many harms, the Commission should keep in mind that a full factual inquiry will likely be

required to determine whether NEP and other submetering entities are unlawfully acting as public utilities.

V. The Commission should not adopt a different definition of "public utility" for submetering in the non-residential context.

IEU/OHA/OMA and the Building Owners claim that the Commission should limit its new rebuttable presumption to submetering in the residential context. *See* IEU/OHA/OMA Comments at 3-4; Building Owners Comments at 5. They claim that so-called "shared services arrangements" among commercial and industrial customers "do not pose the kind of problems the Commission seeks to address in this proceeding." IEU/OHA/OMA Comments at 3-4. But IEU/OHA/OMA make little effort to explain what these "shared services arrangements" entail, or why they are different than residential submetering. Nothing in the relevant statutes suggests that there should be a different definition of "public utility" in the residential context versus the non-residential context. Rather, any entity that is "engaged in the business" of supplying electricity is a public utility under R.C. 4905.03(C), so if a "shared service arrangement" involves a commercial or industrial entity reselling utility service at a mark-up, that entity is profiting from providing electricity and is plainly "engaged in the business" of supplying electricity. Further, actions by submetering companies to serve commercial and industrial customers equally violate the Certified Territories Act and similarly undermine the certified territory of the lawful public utility. The Commission should adopt the same test for residential and non-residential contexts, and there are no grounds for the special exemption for non-residential entities requested by IEU/OHA/OMA.

VI. The Commission should not adopt a different definition of "public utility" for submetering entities operating in the service territory of municipal utilities or cooperatives.

NEP argues that the Commission's rebuttable presumption should not apply to submetering entities operating in the service territory of municipal utilities or cooperatives because the Commission lacks full price-regulation jurisdiction over these entities. NEP Comments at 2. This argument defies understanding. While it is true that municipal utilities and non-profit electric utilities are excluded from the statutory definition of "public utility," this fact only provides support for the approach advocated by AEP Ohio and Duke: If NEP or other submetering entities are merely passing on master meter costs, they are akin to a non-profit utility and can be excluded from regulation as a public utility. But if they are reselling utility service at a mark-up, they are just like other for-profit public utilities and should be regulated as such.

Further, though the Commission lacks full price-regulation jurisdiction over municipal and cooperative utilities, the Commission has never applied a different definition of "public utility" in the service territory of these entities. Nor is there anything in the statute to support such a distinction. Moreover, while a Home Rule municipality can authorize multiple non-exclusive franchises within its geographic area as an exception to the Certified Territories Act, that does not change the requirement that the franchisee has to otherwise be lawfully operating in providing public utility service to retail customers. The same definition of "public utility" must apply everywhere, no matter whose service territory the submetering entity is operating in.

VII. Submetering "costs" and other fees, such as common area charges, can simply be recovered in rent.

Several parties argue that the threshold percentage should be set to allow submetering entities to recover their alleged "costs." *See, e.g.*, Building Owners Comments at 9. Other

parties argue that the Commission should be careful to separate out utility charges for common areas and the like. *See, e.g.*, NEP Comments at 2. But the answer to both concerns is the same: Landlords and condominium associations can simply recover these "costs" and "charges" through rent or condominium association fees, just as they recover costs for the roof, walls, floors, doors, gutters, and all of their other "costs" through rent or association fees. It is when they attempt to recover these charges on a "utility bill" that they run afoul of the Commission's regulation of public utilities. These objections, therefore, can be easily dismissed; nothing about the Commission's proposed rebuttable presumption (or Joint Applicants' proposed reformulation) will prohibit submetering entities from recovering their "costs."

VIII. The Commission should retain jurisdiction over submetering to address transition issues.

As AEP Ohio and Duke have noted repeatedly before in this docket, the Commission should retain jurisdiction over submetering to address issues related to a transition away from submetering. This should include, among other things, timely cost recovery for costs incurred by public utilities such as AEP Ohio and Duke in taking over service to submetered buildings.

Relatedly, for submetering entities that are deemed public utilities, the Commission should not "require certification of submeterers" and regulate their activity without further proceedings, as the Residential Advocates assert (at 3). Any submetering entity operating as a public utility in the service territory of AEP Ohio or Duke is likely violating the Certified Territory Act (among other potential laws and regulations) and may be required to cease operations. The Commission should retain jurisdiction over the submetering issue in order to determine the appropriate remedy for submetering entities deemed public utilities on a case-by-case basis.

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 *Reply Comments of Ohio Power Company and Duke Energy Ohio, Inc.* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 3rd day of February, 2017, via electronic transmission.

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Summary: Reply Comments of Ohio Power Company and Duke Energy Ohio, Inc. electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company