

In the Matter of the Commission's )  
Investigation of Submetering in the State ) Case No. 15-1594-AU-COI  
of Ohio. )

**REPLY COMMENTS  
BY  
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The PUCO should rein in overcharges and abusive practices by submeterers.

Consumers of submetered utility service should pay just and reasonable rates, should

receive adequate service, and should be protected when it comes to service quality, safety, and billing and collection practices.

In the Finding and Order (“Order”) issued in this case on December 7, 2016, the PUCO took some actions to protect residential consumers who are being overcharged for utility service under submetering arrangements. In the Order, the PUCO established a rebuttable presumption that a submeterer is a public utility (and subject to PUCO regulations) if it charges its customers a certain percentage above the total bill of similarly-situated customers of the local public utility.<sup>1</sup> The PUCO sought comments on what should be the threshold percentage to establish the rebuttable presumption.<sup>2</sup>

In response to the PUCO’s Order, the Coalition on Homelessness and Housing in Ohio, the Legal Aid Society of Southwest Ohio, LLC, Edgemont Neighborhood Coalition, the Office of the Ohio Consumers’ Counsel (“OCC”), and Ohio Poverty Law Center (“OPLC”) (collectively, “Consumer Groups”) jointly filed Comments on January 13, 2017. In our Comments, we urged the PUCO to do more to protect residential consumers of submetered utility service from overcharges and abusive practices. The PUCO should broadly define “public utility” to include any submeterer that is engaged in the business of supplying electricity to residential consumers for profit, or water to residential consumers regardless of the submeterer’s non-profit status.<sup>3</sup> Such an interpretation is consistent with Ohio law. And the charges for submetered residential utility service should closely align with the submeterer’s costs.<sup>4</sup> Thus, the PUCO should

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<sup>1</sup> Order at 9.

<sup>2</sup> *Id.* at 11.

<sup>3</sup> Consumer Groups Comments at 4-5.

<sup>4</sup> *Id.* at 6.

set the threshold at the rate a residential customer of the distribution utility would pay for generation, transmission, and distribution for the same usage, excluding any riders not charged to the submeterer.<sup>5</sup>

Also filing comments were Nationwide Energy Partners, LLC (“NEP”); Industrial Energy Users-Ohio, Ohio Hospital Association and Ohio Manufacturers’ Association (collectively, “Commercial Customers”); Ohio Power Company and Duke Energy Ohio, Inc. (collectively, “AEP/Duke”); American Power and Light (“APL”); Direct Energy Services, LLC and Direct Business Services, LLC (“Direct Energy”); Guardian Water & Power, Inc. (“Guardian”); Mark Whitt (“Whitt”); and the Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio.<sup>6</sup>

In these Reply Comments, the Consumer Groups respond to arguments raised in other parties’ comments. If we do not address a particular argument, it should not be assumed that we either support or oppose the argument.

## II. RECOMMENDATIONS

### **A. The PUCO has jurisdiction over every public utility in Ohio regardless of their other business interests, and should assert that jurisdiction to protect consumers from abusive practices and charges for utility service.**

APL claims that the PUCO has no jurisdiction over landlords, lessors, and condominium associations that submeter utilities to tenants, lessees, and condominium

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<sup>5</sup> *Id.* at 7.

<sup>6</sup> Dayton Power and Light filed comments stating that it has no opinion on the subject. The Utility Management and Conservation Association filed a notice that it would defer its comments until after rehearing on the Order is complete.

unit owners.<sup>7</sup> APL asserts that the Supreme Court of Ohio’s decision in *Pledger*<sup>8</sup> and the PUCO’s decision in *Freshens Yogurt*<sup>9</sup> support its claim. APL is wrong.

The PUCO has jurisdiction over all public utilities in Ohio.<sup>10</sup> In defining “public utility,” R.C. 4905.02(A) states the following: “As used in this chapter, ‘public utility’ includes *every* corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit...” (emphasis added). The law contains few exceptions: an electric light company that does not operate for a profit; public utilities owned and operated *exclusively by and solely for* the utility’s customers; utilities owned or operated by a municipal corporation; railroads; and certain services provided by telephone companies.<sup>11</sup> The law does not exempt landlords, lessors, or condominium associations from being public utilities under the PUCO’s jurisdiction.

Generally, landlords, lessors, or condominium associations are utility companies if they are engaged in the business of providing utility service.<sup>12</sup> Whether landlords, lessors, or condominium associations are public utilities as defined by the statute would depend on whether their utility operations fit into one of the exemptions.

APL exaggerates the scope of the findings in *Pledger* and *Freshens Yogurt*. In *Pledger*, the Supreme Court of Ohio examined whether the PUCO had unreasonably

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<sup>7</sup> APL Comments at 1-2.

<sup>8</sup> *Pledger v. Publ. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14 (2006).

<sup>9</sup> *Toledo Premium Yogurt, Inc., dba Freshens Yogurt v. The Toledo Edison Company*, Case No. 91-1528-EL-CSS, 1992 Ohio PUC LEXIS 850, Entry (September 17, 1992).

<sup>10</sup> R.C. 4905.04.

<sup>11</sup> R.C. 4905.02(A)(1)-(5).

<sup>12</sup> See R.C. 4905.03(C) (electricity), R.C. 4905.03(E) (natural gas), R.C. 4905.03(G) (water).

applied the *Shroyer*<sup>13</sup> test.<sup>14</sup> The Court determined that, *based on the facts*, the PUCO's decision was reasonable.<sup>15</sup> The facts in *Pledger* included that:

- (1) The tenant failed to show that the landlord had received from the PUCO a franchised territory or a certificate of convenience and necessity to provide water service and that the landlord did not manifest an intent to be a public utility by availing itself of special benefits available to public utilities, such as using eminent domain or using the public right of way in rendering water or sewer service;
- (2) The landlord did not hold itself out as providing water and sewer services to the general public; and
- (3) The landlord's provision of utility service to its tenants was ancillary to its primary business of being a landlord.<sup>16</sup>

Hence, the appellant in *Pledger* did not show that the landlord met any part of the *Shroyer* test.<sup>17</sup> Similarly, *Freshens Yogurt* was decided on its facts. The PUCO determined that the landlords had not availed themselves of the special benefits available to public utilities, that the landlords' electrical services were not available to the general public, and that the provision of electrical service was ancillary to the landlords' primary business. The PUCO determined that, under the facts of the case, the complainant had not

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<sup>13</sup> *In the Matter of the Complaint of Melissa E. Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WW-CSS, Opinion and Order (February 27, 1992).

<sup>14</sup> 109 Ohio St.3d at 465-468.

<sup>15</sup> *Id.* at 466-467.

<sup>16</sup> *Id.* at 466.

<sup>17</sup> *Id.* at 466-467.



made the requisite showing under *Shroyer*.<sup>18</sup> This determination led the PUCO to dismiss the claim against the landlord.<sup>19</sup>

But different facts may lead to a different result. As the PUCO noted in *Shroyer*, a landlord that is providing utility service to someone other than a tenant or an affiliate of the landlord may be a public utility.<sup>20</sup> And the Court in *Pledger* found it significant that the PUCO's decision that was on appeal did not rule that a landlord must be primarily in the business of providing utility service in order to be a public utility:

The PUCO did not say that only if the landlord were primarily in the business of supplying water would the landlord be a water-works company subject to PUCO jurisdiction. Rather, the PUCO found that [the landlord's] primary business was that of being a landlord and to the extent that it provides water and sewer service to its tenants, the provision of those services "is ancillary to [the landlord's] primary business of being a landlord."

The PUCO did not interpret the phrase "in the business of supplying" to require [the landlord] to be "primarily in the business of supplying," as claimed by appellant.<sup>21</sup>

Case law does not provide landlords, lessors, and condominium associations the blanket immunity from PUCO jurisdiction that APL claims. The PUCO must protect the public interest. To do that, the PUCO must determine whether a landlord, lessor, or condominium association is acting as a public utility on a case-by-case basis, which the PUCO could do in this proceeding.

There are some submeterers that the PUCO may assert jurisdiction over without using the rebuttable presumption because it is obvious that their primary business is providing utility service to the general public. For certain submeterers, the resale or

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<sup>18</sup> 1992 Ohio PUC LEXIS 850 [\*6].

<sup>19</sup> *Id.* [\*7].

<sup>20</sup> *Shroyer*, 1992 Ohio PUC LEXIS 137 \*[\*11].

<sup>21</sup> *Pledger*, 109 Ohio St.3d at 467-468.

redistribution of public utility services is their primary business.<sup>22</sup> Their primary business is to offer a full-range of services associated with providing utility service to landlords and condominium associations. There clearly are submeterers who fail all three prongs of the *Shroyer* test. The PUCO should assert its jurisdiction over such submeterers so that residential consumers can have the full array of protections they are entitled to under Ohio law and the PUCO's rules.

**B. The PUCO is justified in revising the *Shroyer* test to help ensure that consumers pay reasonable utility charges and have consumer protections in the PUCO's rules.**

The Commercial Customers contend that the PUCO's proposed revision to the *Shroyer* test – the rebuttable presumption – is unreasonable and unlawful. They claim that there is no statutory or precedential support for the PUCO to establish a rebuttable presumption for determining whether a landlord is a public utility.<sup>23</sup> They also argue that there is no rational nexus between the price of a utility service and a determination of whether providing the utility service is ancillary to a landlord's business.<sup>24</sup> The Commercial Customers are wrong.

As discussed above, the PUCO's decision in *Pledger* did not rule that a landlord would be subject to PUCO jurisdiction only if the landlord were primarily in the business of supplying utility service. Instead, the PUCO must determine on a case-by-case basis whether the provision of utility service is ancillary to the landlord's business. Although the PUCO in the past has not examined the rates landlords charge their tenants for utility service, the PUCO need not strictly adhere to this position forever.

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<sup>22</sup> See OCC/OPLC Application for Rehearing (January 17, 2017) at 2-4. See also Whitt Comments at 5.

<sup>23</sup> Commercial Customers Comments at 4-7.

<sup>24</sup> *Id.* at 7-11.

In the Order, the PUCO noted a change in circumstances since the holding in *Shroyer*. The change, according to the PUCO, is evident in the comments it received regarding “the unreasonably high rates and charges on the resale or redistribution of utility service to customers.”<sup>25</sup> The Commercial Customers claim that this does not constitute a change in circumstances because customers in *Shroyer* and the other cases complained about high prices for utility service.<sup>26</sup> The Commercial Customers, however, ignore the magnitude of the situation.

*Shroyer* and the cases similar to it involved just one or a few customers who complained about high utility charges. However, the current situation being investigated in this proceeding involves thousands of residential customers. OCC and OPLC, for example, demonstrated that as many as three million Ohioans living in apartments and condominiums could be subjected to abusive practices and unreasonably high utility rates by submeterers.<sup>27</sup> This new information is sufficient for the PUCO to determine that circumstances have changed since the *Shroyer* test was established.

The Commercial Customers also erroneously contend that there is no nexus between the rates a landlord charges its tenants for utility service and the issue of whether the landlord is a public utility. The examination of the rates a landlord charges its tenants for a utility service is a necessary step in the PUCO’s determination of whether providing utility service is ancillary to the landlord’s business. One consideration should be whether the landlord makes a profit on providing the utility service and, if so, how much profit the landlord realizes.

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<sup>25</sup> Order at 10.

<sup>26</sup> Commercial Customers Comments at 9.

<sup>27</sup> See OCC/OPLC Reply Comments (February 5, 2016), Attachment 1 at 1.

The Commercial Customers also questioned how the comparison would be made if the utility serving the area is a municipal utility or a cooperative.<sup>28</sup> While Consumer Groups agree that the rebuttable presumption created in the Order should be modified regarding the comparison to “total bill charges,”<sup>29</sup> appropriate comparisons can easily be made to the charges paid by consumers of municipal utilities’ and cooperatives’ services. The PUCO could compare the charges customers of municipal utilities and cooperatives pay for generation, transmission, and distribution services for the same usage. Ohio law requires that the rates of municipal utilities can be no higher than the charge set by municipal ordinances.<sup>30</sup> And most cooperatives in Ohio post their residential rates on their websites.<sup>31</sup>

The Commercial Customers’ arguments against the PUCO establishing its proposed rebuttable presumption are baseless. The PUCO should reject them.

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<sup>28</sup> Commercial Customers Comments at 10.

<sup>29</sup> OCC/OPLC Application for Rehearing (January 6, 2017) at 10-11 (stating that the rebuttable presumption should be compared to what customers of the distribution utility pay for generation, transmission, and distribution services for the same usage, excluding any riders not charged to the submeterer).

<sup>30</sup> R.C. 743.26.

<sup>31</sup> See, e.g., Adams REC (<http://www.adamsrec.com/>); Buckeye REC (<https://www.buckeyerec.coop/index.php/electricity-rates/>); Carroll Electric Cooperative (<http://www.cecpower.coop/content/rates-service-charges-0>); Firelands Electric Cooperative (<http://firelandsec.coopwebbuilder2.com/content/rate-schedules>); Guernsey-Muskingum Electric Cooperative (<http://www.gmenergy.com/content/billing-rates>); Hancock-Wood Electric Co-op (<https://www.hwe.coop/residential/residential-rates/>); Holmes-Wayne Electric Cooperative (<http://www.hwecoop.com/Policies/policies.html>); Licking Rural Electrification (<http://theenergycoop.com/rates/>); Logan County Electric Cooperative (<http://www.logancounty.coop/>); Lorain-Medina Rural Electric Cooperative (<http://www.lmre.org/content/rates>); Midwest Electric (<https://midwestrec.com/electric-rates-and-fees/>); North Central Electric Cooperative (<http://www.ncelec.org/content/rates>); North Western Electric Cooperative (<http://www.nwec.com/content/rates-charges>); Paulding-Putnam Electric Cooperative (<http://ppec.coop/rates/>, <https://www.hwe.coop/residential/residential-rates/>); South Central Power (<https://www.southcentralpower.com/about-us/company-documents/>); Union REC (<https://www.ure.com/content/energy-rates-residential>); Washington Electric Cooperative (<http://www.weci.org/content/rates>).

**C. Direct Energy’s suggestion that the PUCO adopt disclosure requirements for submeterers instead of creating a rebuttable presumption does not adequately protect consumers of submetered utility service.**

Direct Energy asserts that instead of limiting the amount that submeterers may charge, the PUCO should develop disclosure requirements for submetering contracts.<sup>32</sup> Direct Energy claims that properly applied disclosure requirements would deter landlords and property owners from using below-value rents or purchase payments that are negated by high utility charges to attract tenants or purchasers.<sup>33</sup> According to Direct Energy, requiring such disclosures to consumers before they sign a lease or purchase agreement would give them sufficient information to determine the real value of the transaction.<sup>34</sup> Direct Energy also contends that the disclosures would deter landlords and property owners from unreasonably marking up utility charges.<sup>35</sup>

Although Consumer Groups agree that such disclosures should be made to potential lessees and purchasers before they sign a property agreement, these disclosures alone are not adequate to protect consumers. For instance, Direct Energy’s proposal does not protect those residential consumers whose landlord or condominium association converts to submetering after the consumer has occupied the dwelling.

In addition, disclosures to consumers before they sign a lease or purchase agreement are not the cure-all that Direct Energy suggests. Consumers who are about to sign a lease or purchase agreement likely are eager to move into their new home. Some

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<sup>32</sup> Direct Energy Comments at 8-10. Direct Energy erroneously contends that the threshold for the rebuttable presumption would limit the amount that submeterers may charge residential customers. *Id.* at 8. Instead, the presumption would indicate that the submeterer is a public utility because providing utility service is not ancillary to its business. At that point, the submeterer could rebut the presumption by showing that its utility charges are justified by its costs. Order at 9-10.

<sup>33</sup> Direct Energy Comments at 9.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

may be in dire need of securing housing. In either case, most residential consumers in the process of signing a lease or purchase agreement would not read and fully understand technical explanations about “variables that cause a price to fluctuate and descriptions of the term for a fixed period....”<sup>36</sup>

Direct Energy’s suggestion that consumers should be provided with historical usage data for the property at the signing of the lease or purchase agreement would be similarly ineffective.<sup>37</sup> Newly built homes would not have such data available. Even if the usage data were available, it is unlikely that a consumer who is about to sign a lease or purchase agreement would have pricing data available. Thus, the consumers would not be in a position to calculate energy costs based on a 12-month historical usage profile for the property,<sup>38</sup> and compare those costs to their own utility bills or to the bills of other similarly-situated consumers for the 12-month period. It is unreasonable to conclude that such disclosures alone would adequately protect consumers.

Direct Energy attempts to equate consumers who are shopping for a home with consumers who shop for an energy supplier. The comparison is inapt. A consumer shopping for an energy supplier has many alternatives and information about the available alternatives. The alternatives include the local distribution utility’s standard service offer, at rates that are supervised by the PUCO. Importantly, a consumer shopping for an energy supplier has a home and likely has or could access usage data. The same might not be said about consumers who end up in a dwelling that is submetered.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Direct Energy’s suggestion that the PUCO require disclosures *in lieu of* examining a submeterer’s charges for utility service does not adequately protect consumers. Rather, disclosure of essential information to consumers should be required *in addition to* the PUCO examining a submeterer’s charges for utility service.

The PUCO’s rules contain essential protections for consumers who apply for electric service from a public utility. Such consumers are provided with a written summary of their rights and obligations as a utility customer.<sup>39</sup> They also receive valuable information about their services, rates, and choices.<sup>40</sup> Consumers who are considering leasing or purchasing a property that has submetered utilities should also receive such information from the property owner.

**D. To help prevent overcharges to consumers of submetered utilities, the PUCO should set the threshold for the rebuttable presumption at the rate a residential customer of the distribution utility would pay for generation, transmission, and distribution for the same usage, excluding any riders not charged to the submeterer.**

Several parties suggested various ways for the PUCO to set the threshold for the rebuttable presumption. NEP argues that the PUCO “should only apply the percentage threshold based on a comparison between the total bill charges for a similarly situated utility customer and the metered usage charges for the end-user of that specific utility service.”<sup>41</sup> NEP recommends that the percentage be set at zero.<sup>42</sup> While the Consumer Groups have also recommended that the threshold be set at zero percent,<sup>43</sup> we disagree with NEP’s starting point.

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<sup>39</sup> Ohio Adm. Code 4901:1-10-12.

<sup>40</sup> *Id.*

<sup>41</sup> NEP Comments at 4.

<sup>42</sup> *Id.*

<sup>43</sup> Consumer Groups Comments at 3.

As noted in our initial Comments, by comparing the total bill of a residential customer served by a local public utility with a submetered residential customer's total bill, the PUCO is incorrectly allowing the submeterer to charge its residential consumers for costs that it might not incur.<sup>44</sup> For example, submeterers might not pay distribution riders and charges authorized by the PUCO that are non-bypassable for residential consumers under the default standard service offer of public utilities in certified service territories. These charges may include riders for energy efficiency programs, distribution modernization, distribution investment, low-income programs, regulatory compliance, and others.

Consumers should not have to pay for utility services that are not being charged to or provided by the submeterer.<sup>45</sup> Instead, consumers of submetered utilities should pay only those charges that are based on their submeterer's cost to serve them. It is unreasonable to compare "the total bill charges" of consumers served by submeterers to the bills of customers served by the local public utility. The submeterer's cost to resell and redistribute utility service to its consumers is not the same as the local public utility's cost to provide services directly to them. The PUCO should set any threshold at the rate a residential customer of the local public utility would pay for generation, transmission, and distribution for the same usage, excluding any riders not charged to the submeterer.

APL urges the PUCO to ensure that the percentage is applied only to the charges for the submetered utility as measured at the consumer's submeter.<sup>46</sup> APL contends that the threshold percentage should not be applied to other charges that may be assessed by a

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<sup>44</sup> *Id.* at 2.

<sup>45</sup> *See* AEP/Duke Comments at 4-7.

<sup>46</sup> APL Comments at 2.



landlord, condominium association, or lessor.<sup>47</sup> Such charges are for maintenance and lighting of common areas, meter reading and billing services, and miscellaneous charges such as condominium association dues that may be collected along with utility charges.<sup>48</sup> The PUCO should follow APL's suggestion only if the charges are not included as utility charges on consumers' bills and consumers' utility service cannot be disconnected for nonpayment of the charges.

If the charges on a consumer's bill are labeled as utility charges, they should be part of the PUCO's comparison even if the charges are for non-utility services. This is especially true if the consumer's utility service can be shut off for nonpayment of the charges, either in full or in part. In making the comparison for establishing a rebuttable presumption, the PUCO should not assume that there are non-utility charges on a residential consumer's utility bill.

Direct Energy asserts that the PUCO should not compare submeterers' charges to the rates of local public utilities. Instead, Direct Energy argues, the PUCO should determine the reasonableness of a submeterer's charges to consumers by first looking at each submetering company's costs to serve its customers.<sup>49</sup> Then, the PUCO would compare those costs to the total bill charges to its customers.<sup>50</sup> The PUCO would then set an unspecified threshold amount above the submeterer's costs that would trigger the rebuttable presumption that the submeterer is a public utility.<sup>51</sup> Direct Energy's proposal is unworkable and should be rejected.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Direct Energy Comments at 11.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

Direct Energy’s proposal would require the PUCO to examine the costs of any “landlord, condominium association, submetering company, or any other similarly-situated entity”<sup>52</sup> under suspicion of operating as a public utility. This would require the PUCO to go beyond an initial perusal of the submeterer’s charges, and instead conduct an audit of the submeterer’s operation. This would be unnecessarily laborious and time consuming. It is also unclear how the PUCO would gain access to all the information needed to perform such an audit, or how the submeterer would rebut the presumption that it is operating as a public utility.

Guardian states that the PUCO should not regulate entities that bill for utility service at cost plus a competitively derived billing fee.<sup>53</sup> Guardian states that its billing fees may include data reading, monitoring for leaks, billing, and call center services, or any combination of these services.<sup>54</sup> It asserts that its clients contract for its service through competitive bidding, and that its clients continually review its charges.<sup>55</sup> Guardian recommends that the PUCO only regulate companies whose contracts are not competitively bid and whose charges to consumers are above cost.<sup>56</sup>

Guardian’s proposal assumes that the competitive bidding process guarantees that consumers are adequately protected against abusive practices by submeterers. That may not be the case. The PUCO should ensure that if a submeterer whose charges are set by competitive bidding is a public utility, the submeterer’s consumers have all the protections of the PUCO’s rules.

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<sup>52</sup> Order at 9.

<sup>53</sup> Guardian Comments at 3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 4.

### III. CONCLUSION

The PUCO justifiably expanded the *Shroyer* test. However, it did not go far enough to protect consumers. Ohioans need to be protected from abusive practices by submeterers. Companies that are engaged in the business of providing electric service to consumers for a profit, and all submeterers of water service, should be deemed to be public utilities. And the PUCO should require submeterers to extend the same consumer protections to their customers that local public utilities are required to provide. Otherwise, consumers of submeterers receive a lesser service than the law requires.

The PUCO's rebuttable presumption should not compare the total bill charges of similarly-situated customers of the local public utility to the total bill charges of customers of submeterers. This is because submeterers likely will not be charged for all the riders that the public utility's residential customers pay. The PUCO should set any threshold at the rate a residential customer of the local public utility would pay for generation, transmission, and distribution for the same usage, excluding any riders not charged to the submeterer.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply Comments was served via electronic transmission to the persons listed below, on this 3<sup>rd</sup> day of February 2017.

*/s/ Terry L. Etter*

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Summary: Comments Reply Comments by Coalition on Homelessness and Housing in Ohio, Legal Aid Society of Southwest Ohio, LLC, Edgemont Neighborhood Coalition, The Office of the Ohio Consumers' Counsel and Ohio Poverty Law Center electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.