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

APPLICATION FOR REHEARING OF THE SECOND ENTRY ON REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO POVERTY LAW CENTER

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BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Ohioans whose utility service is provided by a submetering entity[1] need to be protected from the abusive practices. To ensure that residential consumers of submetered utility service are protected from those abuses, the Office of the Ohio Consumers' Counsel ("OCC") and Ohio Poverty Law Center ("OPLC") file this application for rehearing[2] of the Second Entry on Rehearing ("Second EOR") in this case.

The Public Utilities Commission of Ohio ("PUCO") began this investigation to determine whether submetering entities are operating as public utilities within the scope of the PUCO's jurisdiction. After receiving comments and reply comments, the PUCO expanded the application of the *Shroyer*[3] test on a case-by-case basis to submetering entities.[4] In its Order, the PUCO created a rebuttable presumption that a submetering entity is a public utility if it charges a certain percentage above the total bill of similarly-situated customers of the local public utility.[5] The

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[1] "Submetering entities" include condominium associations, submetering companies, and other similarly-situated entities engaged in the resale or redistribution of public utility services.

[2] This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

[3] *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (February 27, 1992).

[4] Finding and Order (December 7, 2016) ("Order").

[5] *Id.* at 9.

PUCO sought comments on the reasonable threshold percentage that would trigger the rebuttable presumption.

After receiving comments and applications for rehearing of the Order, the PUCO issued its Second EOR on June 21, 2017. There, the PUCO enacted a safe harbor for submetering entities for overcoming the rebuttable presumption. A submetering entity may avoid regulation as a public utility if it shows it is either 1) "simply passing through its annual costs of providing a utility service charged by a local public utility and competitive retail service provider (if applicable) to its submetered residents at a given premises," or 2) charging a consumer no more than what the local public utility would have charged that same individual submetered customer for "equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs."[6] OCC and OPLC seek rehearing of the Second EOR.

The PUCO's Second EOR is unreasonable and unlawful in the following respects:

> ASSIGNMENT OF ERROR NO. 1: The PUCO's safe harbor whereby submetering entities can avoid regulation as a public utility unreasonably allows submetering entities to charge consumers excessive charges for utility service, reflecting costs that the submetering entity might not incur.
>
> ASSIGNMENT OF ERROR NO. 2: The PUCO's safe harbor unreasonably strips public utility benefits and regulatory protections from consumers.
>
> ASSIGNMENT OF ERROR NO. 3: The PUCO unreasonably placed the burden on consumers to trigger the rebuttable presumption on a case-by-case basis and defend against the submetering entity's claims that it falls within one of the safe harbor provisions for avoiding PUCO jurisdiction.
>
> ASSIGNMENT OF ERROR NO. 4: The PUCO unreasonably failed to establish a detailed procedure for initiating complaints by consumers who are being charged more than they would have paid the local public utility.
>
> ASSIGNMENT OF ERROR NO. 5: The PUCO unreasonably allowed submetering entities to pass on costs associated with the common areas and unreasonably excluded common area charges from the total bill cap.

[6] Second EOR at ¶ 40.

ASSIGNMENT OF ERROR NO. 6: The PUCO unreasonably failed to require submetering entities to itemize all charges for common areas.

ASSIGNMENT OF ERROR NO. 7: The PUCO unlawfully and unreasonably failed to issue a moratorium on the resale of public utility services by submetering entities.

The reasons in support of this application for rehearing and motion for clarification are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Second EOR as requested herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The PUCO through this investigation has continued to make marginal improvements in ensuring that thousands of submetered residential consumers receive some protection against abusive reselling arrangements by submetering entities. Nevertheless, the Second EOR does not go far enough in providing consumer protections.

The Second EOR fails to implement a reasonable and meaningful way for residential consumers of submetered utility service to obtain the protections afforded to similarly-situated residential consumers served by regulated public utilities. The PUCO should provide more protections for residential consumers of submetered utility service.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC and OPLC have participated in this proceeding through the filing of comments, reply comments, and an earlier application for rehearing.

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." As shown herein, the statutory standard to abrogate and modify the Second EOR is met in this case.

III. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The PUCO's safe harbor whereby submetering entities can avoid regulation as a public utility unreasonably allows submetering entities to charge consumers excessive charges for utility service, reflecting costs that the submetering entity might not incur.

Under the *Shroyer* test, whether a submetering entity may be regulated as a public utility hinges on whether providing utility service is ancillary to the entity's primary business. In its December 2016 Order, the PUCO established a rebuttable presumption for determining whether providing utility service is *not* ancillary to the submetering entity's primary business. The rebuttable presumption applies if the submetering entity charges residential customers a certain percentage above the total charges for a similarly-situated customer served by the local utility's tariff rates, an electric utility's standard service offer, or a natural gas utility's standard choice offer.[7] This price comparison for triggering the rebuttable presumption was called the Relative Price Test.[8] The PUCO

[7] Order at ¶ 18.

[8] Second EOR at ¶ 4.

affirmed its decision to establish the rebuttable presumption in its Second EOR and set the specific threshold percentage of the Relative Price Test at zero.[9]

The rebuttable presumption, however, lost significant effect when the PUCO subsequently created a safe harbor in its Second EOR that would allow submetering entities to overcome the rebuttable presumption and avoid the PUCO's jurisdiction.[10] A submetering entity would fall within the safe harbor if it demonstrates that (1) it is "simply passing through its annual costs of providing a utility service charged by a local public utility and competitive retail service provider (if applicable) to its submetered residents" or (2) its "annual charges for a utility service to an individual submetered resident do not exceed what the resident would have paid the local public utility for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs."[11]

OCC and OPLC agree that the PUCO has the authority to assert jurisdiction over submetering entities who are operating as public utilities and who cannot satisfy the *Shroyer* test. OCC and OPLC encourage the PUCO to immediately act to assert such jurisdiction over submetering entities to protect consumers. To this end, the PUCO should determine – either in this proceeding or one the submetering entities are required to initiate – whether the submetering entity is charging consumers more than what the consumer would have paid the local public utility. This will then determine whether the rebuttable presumption is triggered and a submetering entity is presumed to be a public utility under the *Shroyer* test. Any defensive arguments as to whether the presumption

[9] *Id.* at ¶ 40.

[10] *Id.*

[11] *Id.*

can be overcome should be presented during this proceeding or the proceeding initiated by the submetering entity. The PUCO should make a determination as to whether the submetering entity has been operating as a public utility, considering the Shroyer test and other factors that have been established in case law throughout the years. The PUCO should not create a safe harbor provision for submetering entities that allows them to escape jurisdiction prior to the PUCO's analysis and review of all the factors and the application of the *Shroyer* test, as well as other case law.

The safe harbor created in the PUCO's Second EOR allows submetering entities to overcome the rebuttable presumption while also allowing them to charge residential consumers excessive charges that reflect costs that the submetering entities might not incur. The costs of a submetering entity to resell and redistribute utility service to residential consumers from a regulated distribution utility is not likely the same as the cost of providing the regulated utility services to residential consumers directly by a distribution utility.

Specifically, because submetering entities are likely obtaining public utility service at commercial (non-residential) rates, their costs will likely be less than what the resident would have paid the local public utility for equivalent annual usage under the utility's default service tariffs for residential consumers. Additionally, submetering entities who are shopping and purchasing generation from a competitive supplier are likely paying less than what the resident would have paid the local public utility for equivalent annual usage under the utility's non-shopping default service tariffs for residential consumers. In either event, a comparison of charges for submetered service

to the total bill of the local utility's residential customers would be inapt. Residential consumers of submetered utility service would pay an unreasonable amount for service.

Moreover, submetering entities will likely not pay certain distribution riders and charges that a public utility charges similarly-situated residential consumers. They also might not pay some riders at the same level as similarly-situated residential consumers under the default service tariff of the residential consumer's local public utility. For example, submetering entities might not pay or may pay less than residential customers for such riders as for energy efficiency programs, distribution modernization, distribution investment, low-income programs, regulatory compliance, and others.[12] Nevertheless, their charges would be compared to the local utility's residential customers' total bills, which include the full cost of the riders.

Therefore, the safe harbor provision authorizes a submetering entity to charge its customers for costs it might not incur, so long as its charges are not more than the total bill amount for similarly situated residential customers of the local public utility. The safe harbor thus unreasonably allows submetering entities to extract excessive charges from residential consumers.

The Second EOR is unreasonable. The PUCO should modify its Second EOR to require an apples to apples comparison of charges assessed to residential consumers by

[12] For example, under AEP's Energy Efficiency and Peak Demand Reduction Cost Recovery Rider, customers taking power under general service pay significantly less per kWh than residential customers. *See* AEP Distribution Tariff, P.U.C.O. No. 20, 3rd Revised Sheet No. 481-1D; *see also* Duke Energy Ohio Rider EE-PDRR, P.U.C.O. Electric No. 19, Sheet No. 119.1. Under FirstEnergy's electric tariffs, certain customers may be able to avoid FirstEnergy's energy efficiency rider. *See e.g.,* The Cleveland Electric Illuminating Company, P.U.C.O. No. 13, Sheet 115. Submetering entities that consume more than 833,000 kWh each month will receive benefits under universal service fund riders not available to individual residential consumers. *See In the Matter of the Application of the Ohio Development Services Agency for an Order Approving Adjustments to the Universal Service Fund Rider of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 16-1223-EL-USF, Opinion and Order (December 21, 2016).

submetering entities with those charged to residential consumers under the local public utility's default service tariffs under the safe harbor provision.

ASSIGNMENT OF ERROR NO. 2: The PUCO's safe harbor unreasonably strips public utility benefits and regulatory protections from consumers.

The excessive charges or price a submetered residential consumer pays for public utility service is not the only concern that should be addressed by the PUCO. The PUCO should also address the abusive practices of some submetering entities. Under the safe harbor provision created in the PUCO's Second EOR, a submetering entity can overcome the rebuttable presumption and avoid the PUCO's jurisdiction if it can demonstrate that its charges for utility service are no more than what the resident would have paid the local public utility.[13] This concept may seem reasonable *if* submetered residential customers received *all* of the same benefits and regulatory protections residential consumers receive from the local public utility. Unfortunately, they do not.

Even if a submetered residential consumer would pay a submetering entity the same amount that would have been paid to the local public utility, the submetered consumer is worse off. This is because the consumer of submetered service is not afforded the same consumer protections (established by PUCO rules and orders) that residential consumers of regulated public utilities receive. Specifically, the submetered consumer is not protected from unreasonable or abusive practices by the submetering entity and lacks competitive alternatives. Additionally, the consumer of submetered service does not receive benefits for certain utility programs, such as the Percentage of Income Payment Plan ("PIPP"), offered by regulated public utilities.

[13] *Id.*

Moreover, it is unreasonable under the safe harbor to determine whether a submetering entity is simply passing through its annual costs. It is also unreasonable to compare the submetering entities' annual charges to the "equivalent annual usage, on a total bill basis" for similarly situated customers of the local utility. The contracts entered into by the submetering entity that set its annual costs or may be the basis of its annual charges generally are not be subject to scrutiny by the PUCO or consumers. Consumers have no ability to affect or change the terms of the contract entered into by the submetering entity, or to choose an alternative supplier if the submetering entity's competitive price for the commodity is too high. This lack of choice conflicts with the Ohio General Assembly's intent to encourage market access for cost-effective supply of retail electric and natural gas services.[14] Submetering arrangements foreclose residential consumers' ability to shop for their electric and/or gas supply and are inconsistent with the directives of the General Assembly.

The established safe harbor is also unreasonable because it allows submetering entities to avoid PUCO regulations that were instituted to protect the public. For example, unless a submetering entity is subject to PUCO jurisdiction and regulation, the submetering entity is not required to follow the PUCO's disconnection procedures.[15] These disconnection procedures designed to protect residential consumers from unreasonable and potentially life threatening disconnection of their utility services.

[14] *See* R.C. 4928.02 and R.C. 4929.02.

[15] *See* Ohio Adm. Code Chapter 4901:1-18.

This scenario is illustrated in a complaint pending before the PUCO in which a submetering entity, Nationwide Energy Partners LLC ("NEP"), threatened to disconnect a consumer's electric and water service unless she paid $600 to maintain service in the middle of the winter heating season.[16] That case illustrates NEP's failure to follow the disconnection procedures provided in Ohio Adm. Code Chapter 4901:1-18 and the procedures established in the Winter Reconnection Order.[17]

Finally, submetered residential customers do not receive the benefits associated with the costs they may pay. For example, submetered consumers are not eligible for low income assistance programs offered by regulated public utilities, such as PIPP. Low income assistance programs are offered to customers of regulated public utilities to assist them in obtaining public utility service at an affordable monthly payment. Low income assistance programs are funded by other residential and non-residential consumers.

Submetering entities would be required to pay for such low-income assistance programs through their purchase of distribution service from the local public utility and would presumably pass along those costs to its residential submetered customers. Yet, OCC and OPLC are not aware of any submetering entity that offers its customers a low-income assistance program, even though those consumers are effectively paying to subsidize the low-income programs offered to other consumers taking service directly from the local public utility.

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[16] *See In the Matter of the Complaint of Cynthia Wingo v. Nationwide Energy Partners, LLC,* Case No. 16-2401-EL-CSS, Complaint (December 15, 2016).

[17] *In the Matter of the Commission's Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2016-2017 Winter Heating Season,* Case No. 16-1782-GE-UNC (September 14, 2016).

The safe harbor created in the Second EOR is unlawful and unreasonable. It allows a submetering entity to charge its residential customers its costs associated with benefits, such as low income assistance programs for customers of regulated public utilities, that are not correspondingly offered to its customers. The submetering entity could thus satisfy the safe harbor, but its residential customers would pay for something from which they can never benefit. This result is unlawful and unreasonable.

Again, the PUCO would be remiss if it only considered the excessive charges assessed to submetered residential customers for public utility service in implementing the safe harbor. The PUCO must also consider the benefits and protections that come from *regulated* public utilities and not from submetering entities. The PUCO should modify its Second EOR so that its safe harbor includes the comparison of public utility benefits and regulatory protections for which submetered residential consumers pay, but do not receive. Submetering entities should not avoid PUCO regulation based on costs associated with programs that the entity does not offer, and its residential customers do not benefit from.

ASSIGNMENT OF ERROR NO. 3: The PUCO unreasonably placed the burden on consumers to trigger the rebuttable presumption on a case-by-case basis and defend against the submetering entity's claims that it falls within one of the safe harbor provisions for avoiding PUCO jurisdiction.

In the Second EOR, the PUCO explained that "a submetered residential customer can trigger the rebuttable presumption through use of the Relative Price Test."[18] It further explained that residential customers can compare their bills to what they would have paid the local public utility. If a residential customer of submetered utility service is

[18] Second EOR at ¶ 50.

paying the submetering entity more than would have been paid the local public utility, the submetering entity is presumed to be a public utility under the third prong of the *Shroyer* test.[19]

The Second EOR is unreasonable because it places the burden for showing that a submetering entity is operating as a public utility (on a case-by-case basis) on the thousands of submetered residential consumers. It is not clear how the PUCO would initiate the process to invoke its jurisdiction and intervene to stop the excessive charges and abusive practices of the submetering entity. Would each submetered consumer residing in the same complex need to individually trigger the rebuttable presumption to invoke the PUCO's jurisdiction over the submetering entity? Or could one submetered consumer, association, or residential advocate trigger the rebuttable presumption on behalf of all residents of the same complex served by the same submetering entity? If the PUCO intended the former, it would be unduly burdensome and a strain on the PUCO's resources to require each and every residential consumer served by a specific submetering entity to trigger the rebuttable presumption by initiating a complaint before the PUCO.

Instead, as stated previously, the burden should rest with the relatively few submetering entities to demonstrate that they are not operating as public utilities. The submetering entities should have the burden to defend against being under the PUCO's jurisdiction. Individual residential consumers should not have to show that the submetering entity is a public utility. If the Second EOR contemplates individual

[19] *Id.*

complaints, the sheer number of such complaints that would be necessary warrants rehearing.

Further, a submetering entity's demonstration that it satisfies the safe harbor would appear to unreasonably shift the burden back to the submetered consumer to prove that the entity is in fact operating as a public utility under the third prong of the *Shroyer* Test. While some consumers may have legal representation, the PUCO's approach should enable consumers to file and process complaints on their own without undue burden and expense. But the PUCO's approach in the Second EOR will be a difficult burden for individual consumers to bear, particularly because of the expertise required concerning the components of the regulated public utility rates and services provided to customers of regulated public utilities. Expertise is also needed to determine which costs or charges the resident would have paid the local public utility "for equivalent annual usage, on a total bill basis, under the local public utility's default service tariffs" or what "annual costs of providing utility services" means. Typical residential customers of submetered utility service would not have this type of expertise, which will continue the unfair advantage for submeterers.

The Second EOR is unreasonable. The PUCO should modify its Second EOR to clarify that the submetering entity has the burden of proof in applying the *Shroyer* Test.

ASSIGNMENT OF ERROR NO. 4: The PUCO unreasonably failed to establish a detailed procedure for initiating complaints by consumers who are being charged more than they would have paid the local public utility.

The Second EOR is unreasonable because it fails to establish a procedure or process for initiating a proceeding after the rebuttable presumption is triggered. It also fails to clarify when and how exactly the rebuttable presumption will be "triggered" by a

submetered consumer thereby invoking the PUCO's jurisdiction, and most importantly, the PUCO's intervention or action. Specifically, although the Second EOR ordered the development of a "website tool" for submetered consumers to perform the Relative Price Test, the Second EOR fails to detail what action submetered consumers must take in the event the submetered customer determines that its submetering entity fails the Relative Price Test.

Further, it is unclear whether the PUCO's jurisdiction will be automatically invoked after completing the to-be-developed website tool or whether residential consumers will have to take further action, beyond completing the website tool, to trigger the rebuttable presumption and invoke the PUCO's jurisdiction and intervention. Will an informal complaint through the PUCO's call center, notifying the PUCO that a submetering entity has failed the Relative Price Test, be sufficient to invoke the PUCO's jurisdiction and its action? Or will the submetered consumer be required to expend time (and, possibly, money) to prepare and file a formal complaint?

Under the Second EOR, consumers are left to speculate as to how they are to proceed in the event a submetering entity fails the Relative Price Test. If further action or additional steps are required by the submetered consumer, the PUCO should explain with specificity what actions and steps are required. Additionally, the PUCO should clarify that submetered consumers need only allege, in either a formal or informal complaint to the PUCO, that a certain submetering entity has failed the Relative Price Test for the submetering entity to be presumed a public utility and the PUCO to assume jurisdiction over that submetering entity. The burden should then shift to the submetering entity to prove that it is not a public utility. If further action or additional steps are required by the

submetered consumer, the PUCO should also clarify that residential utility advocates or other advocacy groups/associations may assist the submetered consumers by participating in the proceeding established by the PUCO.

Accordingly, the PUCO should modify its Second EOR. The PUCO should clarify the above issues. It should also establish that once a submetering entity is found to be operating as a public utility under PUCO jurisdiction, it will be deemed a public utility regarding every submetering arrangement it has with each of its submetered residential customers located at a given premises. The submetering entity should then have the burden to prove otherwise.

ASSIGNMENT OF ERROR NO. 5: The PUCO unreasonably allowed submetering entities to pass on costs associated with the common areas and unreasonably excluded common area charges from the total bill cap.

In its Second EOR, the PUCO explained that in calculating the submetering entity's charges under the Relative Price Test, "a submetered residential customer should include any administrative fees or similar charges, but should exclude any charges for common areas."[20] Further, the PUCO held that for common areas, it will not assert jurisdiction over a submetering entity where the entity "is simply passing through its costs of providing a utility service charged by a local public utility and competitive retail service provider (if applicable) to its submetered residents at a given premises."[21] In this regard, the PUCO's Second EOR is unlawful and unreasonable for two reasons.

First, the Second EOR is unreasonable because it appears to authorize submetering entities to separately pass through to submetered customers its "costs" for

[20] *Id.* at ¶ 49.

[21] *Id.*

common areas without specifying or limiting what constitutes costs for common areas that a submetering entity may charge.[22] Common area charges should be excluded from collection from submetered consumers. The costs to operate the common areas should be a cost to do business and, therefore, should be embedded in association fees or the rent.

Second, the Second EOR is unreasonable because it would exclude the costs for the common areas in the Relative Price Test, meaning that common area charges could be collected outside of the "total bill cap" created by the PUCO as a consumer protection. The costs associated with common areas should be embedded in the PUCO's total bill comparison. Under the total bill comparison, common area charges should be included in the profit that the submetering entity already enjoys, given that the submetering entity's actual costs are likely below a residential consumer's regulated total bill under the local utility's default service tariffs as explained above.

The total bill analysis embedded in the safe harbor, although not perfect as explained above, provides a standard at which submetered residential customers can determine the reasonableness of charges for public utility service in total. That same comparison should apply to and include utility service for common areas.

The PUCO gave no reason in its Second EOR why the total bill comparison should exclude costs associated with common areas. The PUCO should modify its Second EOR accordingly.

ASSIGNMENT OF ERROR NO. 6: The PUCO unreasonably failed to require submetering entities to itemize all charges for common areas.

[22] *See* Second EOR at ¶ 49.

As noted above, a residential customer taking submetered utility service is to exclude charges for common areas for purposes of the Relative Price Test. But in order to easily calculate the submetering entity's charges under the Relative Price Test, the customer must know exactly what charges are related to his or her public utility consumption (i.e., individual charges) and what are related to common areas. The only way to distinguish between individual charges and common area charges is if the customer's bill is itemized. The Second EOR, however, did not require itemized bills.

The PUCO should modify its Second EOR to clarify that submetering entities are required to separately itemize charges associated with public utility service provided to the common areas. Other utilities must itemize bills.[23] The PUCO should specifically require that charges for public utility service to the residence, administrative fees or similar charges, and common area charges to all be separately itemized. This will allow the consumer and the PUCO to perform the Relative Price Test and the total bill analysis under the safe harbor. Separate itemization of all charges may also prevent the submetering entity from billing *all* administrative fees or similar charges under "common area charges" purposely to lower its charges under the Relative Price Test and avoid the rebuttable presumption.

Accordingly, the PUCO should modify its Second EOR in order to clarify the above issues.

ASSIGNMENT OF ERROR NO. 7: The PUCO unlawfully and unreasonably failed to issue a moratorium on the resale of public utility services by submetering entities.

[23] *See* Ohio Adm. Code 4901:1-10-22 (electric), 4901:1-13-11 (natural gas), 4901:1-15-23 (water and sewer).

The PUCO in its Second EOR denied the request by OCC and OPLC to impose a moratorium on the establishment of new residential submetering arrangements.[24] The PUCO found that "prohibition of the resale of public utility service is not an option in this proceeding."[25] In so finding, the PUCO relied on *In re FirstEnergy Corp. v. Pub. Util. Comm.*, where the Supreme Court of Ohio held that an electric utility cannot prohibit the resale of electric service by a landlord to a tenant if the resale took place only on the landlord's property.[26]

The PUCO's Second EOR is unlawful and unreasonable because the PUCO failed to assert authority over those submetering entities operating as public utilities that have *no* ownership interest in the landlord's property where the resale took place. Specifically, in *FirstEnergy*,[27] the Court quoted the PUCO's decision in *In re Brooks v. Toledo Edison Co.*[28] as follows: "The Brooks decision held that [the electric utility] could not restrict the resale or redistribution of electric service by a landlord to a tenant if the resale or redistribution takes place only upon property owned by the landlord, and if the landlord was not operating as a public utility."[29]

The PUCO's reliance on *FirstEnergy* and *Brooks* is misplaced for two reasons. First, the landlord in *Brooks* owned the property upon which the resale or redistribution took place. And second, the landlord was *not* operating as a public utility.

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[24] OCC and OPLC's Application for Rehearing (January 6, 2017) at 17.

[25] Second EOR at ¶ 23.

[26] *Id.*

[27] 96 Ohio St.3d 371, 2002-Ohio-4847, 775 N.E.2d 485.

[28] Case No. 94-1987-EL-CSS (May 8, 1996).

[29] 96 Ohio St.3d 371, 2002-Ohio-4847, ¶5.

In the context of this proceeding and upon review of several residential submetering entities, *Brooks* can be distinguished from this case. Unlike in *Brooks*, many of the submetering entities at issue here do not own the property or have a property interest in the land where they are reselling public utility service to tenants and condominium unit owners. Unlike landlords, there are submetering entities that are in the sole or primary business of reselling and delivering utility service to condominium unit owners and residential tenants. The submetering entities do not own, or have rights to, the owner's property. Rather, the submetering entities install and maintain equipment, distribution facilities, and infrastructure on property owned by others.

Because submetering entities are wholly distinguishable from the landlord in *Brooks*, the PUCO improperly relied on *FirstEnergy* to reject the request for a prohibition or moratorium on the resale of public utility services by submetering entities that are not landlords or owners of the property. Consequently, the PUCO's denial of OCC's and OPLC's request for a moratorium is unlawful and unreasonable. The PUCO should abrogate that portion of its Second EOR and impose a moratorium on the establishment of new residential submetering arrangements where the submetering entity does not own the property where the utility service is being provided.

IV. CONCLUSION

The PUCO should grant rehearing on the claims of error discussed above, and clarify, modify, or abrogate its June 21, 2017 Second EOR as recommended herein. Granting rehearing is necessary to ensure that submetered residential customers are receiving from submetering entities similar benefits and charges as they would if they were customers of the local public utility.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served by electronic mail to the persons listed below, on this 21st day of July, 2017.

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Summary: App for Rehearing Application for Rehearing of the Second Entry on Rehearing by The Office of the Ohio Consumers' Counsel and Ohio Poverty Law Center electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.