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**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S APPLICATION FOR REHEARING OF THE SECOND ENTRY ON REHEARING

Pursuant to Section 4903.10 of the Ohio Revised Code and Rule 4901-1-35 of the Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") request rehearing of the Second Entry on Rehearing issued in this proceeding on June 21, 2017. The Second Entry on Rehearing is unlawful and unreasonable on the following grounds:

1. The Second Entry on Rehearing is unlawful and unreasonable because it does not clarify that a Reseller found to be a public utility in a complaint proceeding must be enjoined immediately from continuing to operate as a public utility, as continued operation would be in violation of Sections 4933.81 through 4933.90 of the Revised Code (the "Certified Territory Act" or "CTA").
2. The Second Entry on Rehearing is unlawful and unreasonable because application of the Modified *Shroyer* Test and Safe Harbors on a case-by-case basis, as described therein, will produce absurd results which may allow a Reseller to be declared a public utility as to only a single residential sub-metered customer at a premise.

As demonstrated in the attached Memorandum in Support, the Commission should grant the Companies' Application for Rehearing and clarify that: (1) Resellers found to be operating as

a public utility in a complaint proceeding must be enjoined immediately from continuing to operate as a public utility; and (2) Resellers found to be operating as a public utility in a complaint proceeding brought by a single residential sub-metered customer are also operating as a public utility as to, at a minimum, all residential sub-metered customers at the same premise.

Respectfully submitted,

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On Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

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MEMORANDUM IN SUPPORT OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S APPLICATION FOR REHEARING OF THE SECOND ENTRY ON REHEARING

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I. INTRODUCTION

The Commission's efforts in this proceeding are certainly commendable. The sub-metering issue in Ohio is complex, involving numerous interests to protect. Respectfully, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") disagree with the Commission's decision to base the Modified *Shroyer* Test and Safe Harbors upon the public utilities' residential default service rates. The Companies continue to believe that the Commission should adopt a test which declares a Reseller to be operating as a public utility if it makes any profit (or charges any mark-up to customers) in the resale of public utility service.[1] However, based on the Commission's current formulation of the Modified *Shroyer* Test, the Companies respectfully request that the Commission grant rehearing to clarify several issues raised by the Second Entry on Rehearing that must be addressed to ensure that the Modified *Shroyer* Test indeed provides protections to the numerous interests at stake here. Accordingly, the Commission should grant this Application for Rehearing and clarify the following issues:

First, the Commission should grant rehearing to clarify that a Reseller found to be a public utility in a complaint proceeding must be enjoined immediately from continuing to operate as a public utility. The Commission's Entries in this proceeding have not addressed the implications of a Reseller being declared a public utility in a complaint proceeding.[2] Presumably, however, a Reseller declared to be a public utility in such proceeding will be required to either (1) comply

[1] *See In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI ("Sub-metering Investigation"), Joint Application for Rehearing of Ohio Power Company; Duke Energy Ohio, Inc.; and Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 5 (Jan. 6, 2017).

[2] *See* Sub-metering Investigation, Finding and Order (Dec. 7, 2016); *see also* Sub-Metering Investigation, Entry on Rehearing (Feb. 1, 2017) (granting Applications for Rehearing for further consideration); *see also* Sub-metering Investigation, Second Entry on Rehearing ("Second Entry on Rehearing") (June 21, 2017).

with the many statutes and regulations applicable to public utilities[3] or (2) cease operating as a public utility altogether. The first of these options, however, is already prohibited by Ohio law.

Sections 4933.81 through 4933.90 of the Ohio Revised Code (the "Certified Territory Act" or "CTA") prohibit operation as a public utility within the certified territory of another public utility.[4] Thus, a Reseller declared to be a public utility in a complaint proceeding has already violated the Certified Territory Act by operating as a public utility within the certified territory of another public utility and, thus, should be enjoined immediately from further operating as a public utility. The Commission should grant rehearing on this issue to provide certainty to both public utilities and harmed residential sub-metered customers that Resellers will not be allowed to continue their practice as a public utility once they have become subject to the Commission's jurisdiction.

Second, the Commission should grant rehearing to clarify that a Reseller found to be a public utility in a complaint proceeding brought by a single sub-metered customer is also operating as a public utility as to, at a minimum, all residential sub-metered customers at the premise. As discussed above, any Reseller found to be a public utility in a complaint proceeding must cease operating as a public utility immediately. This next question is: ***how*** can a Reseller stop operating as a public utility? Two options immediately come to mind: (1) the Reseller could reduce what it charges the Complainant so as to comply with the third-prong of the Modified *Shroyer* Test; or (2) the Reseller could stop providing sub-metered electric service to the Complainant altogether.

Both options raise significant issues. The former allows Resellers to cease operating as a public utility by merely reducing the rate it charges the single Complainant, increasing the

[3] *See, e.g.*, R.C. 4905.10 (requiring public utilities to pay an annual financial assessment), R.C. 4905.30 (requiring public utilities to print and file with the Commission schedules showing, among other things, all rates to be charged).
[4] *See* R.C. 4933.81 – 4933.90.

opportunity for charge shifting and gamesmanship by Resellers. The latter increases the likelihood of a patchwork transition from sub-metered service to service from the local public utility at the Reseller's premise, resulting in operational difficulties for the public utility, increased expense, and delays for customers.

Fortunately, there is a simple solution to the above issues. The Commission may grant rehearing and clarify that a Reseller found to be a public utility in a complaint proceeding brought by a single residential sub-metered customer is acting as a public utility as to, at a minimum, all residential sub-metered customers at the premise. This will ensure that the Reseller may not avoid ongoing designation as a public utility simply by shifting its charges from the Complainant to other residential sub-metered customers at the same premise. Additionally, this clarification will alleviate many of the operational difficulties that may be experienced by local public utilities should a Reseller decide to cease its sub-metering practice upon being declared a public utility. Thus, the Commission should grant rehearing on this issue to ensure that all sub-metered residential customers at the same premise as the Complainant are adequately protected should the Reseller at the premise be declared a public utility.

As fully set forth herein, the Commission's failure to clarify the above issues in its Second Entry on Rehearing is unlawful and unreasonable because it creates significant uncertainty regarding the application and effectiveness of the Modified *Shroyer* Test in practice. Accordingly, the Companies respectfully request that the Commission grant this Application for Rehearing.

II. ARGUMENT

A. The Second Entry on Rehearing is unlawful and unreasonable because it does not clarify that a Reseller found to be a public utility in a complaint proceeding must be enjoined immediately from continuing to operate as a public utility.

In the Second Entry on Rehearing, the Commission makes clear that a Reseller's failure to demonstrate that it falls within one of the Safe Harbor provisions after the Complainant has demonstrated that "the submetered customer has paid more than what he/she would have paid the local public utility," "invoke[s] Commission jurisdiction over the Reseller."[5] Once Commission jurisdiction is invoked, the Reseller would thus be subject to the many statutes and regulations applicable to public utilities. Presumably, then, once a Reseller is declared to be a public utility in a complaint proceeding, the Reseller must either (1) comply with all of these statutes and regulations, or (2) cease operating as a public utility altogether. The first of these options, however, is illegal under Ohio law.

Sections 4933.81 through 4933.90 of the Ohio Revised Code (the "Certified Territory Act" or "CTA") forbid an entity from operating as a public utility within the certified territory of another public utility.[6] Indeed, to do so is a felony in the fifth degree under the CTA.[7] Moreover, by definition, any Reseller found to be a public utility by virtue of failing the third-prong of the Modified *Shroyer* Test would be in violation of the CTA because it would have been operating as a public utility within the certified territory of the local public utility providing the Reseller master-meter services. Accordingly, the only appropriate action for the Commission to take upon finding that a Reseller is operating as a public utility in a complaint proceeding is to also find that the Reseller has violated the Certified Territory Act.

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[5] *Id.* [Second Entry on Rehearing at ¶[50].
[6] *See* R.C. 4933.83.
[7] *See* R.C. 4933.86 (establishing the use of remedies and penalties provided in, among other statutory provisions, division (B) of Section 4905.99 of the Revised Code).

The Second Entry on Rehearing, however, does not make it clear that this is the action that will be taken by the Commission. Indeed, the Second Entry on Rehearing can be read to indicate that the Commission will merely require Resellers that operate as a public utility to take actions to comply with the statutory and regulatory requirements imposed on public utilities.[8] While these requirements are certainly rigorous and likely a strong deterrent to Resellers, such course of action is not a sufficient substitution for the protections provided under the CTA. Moreover, such course of action could leave residential sub-metered customers in a state of limbo whilst the Reseller attempts to comply with all the requirements imposed upon a public utility. Rather than subjecting public utilities and residential sub-metered customers to these risks and delays, the Commission should grant rehearing on this issue and clarify that a Reseller found to be operating as a public utility in a complaint proceeding must be enjoined immediately from continued operation as a public utility.

B. The Second Entry on Rehearing is unlawful and unreasonable because application of the Modified *Shroyer* Test and Safe Harbors on a case-by-case basis, as described therein, will produce absurd results.

Throughout the Second Entry on Rehearing, the Commission emphasizes that the Modified *Shroyer* Test must be performed on a case-by-case basis.[9] For example, the Commission states: "***While our determination of jurisdiction over a particular service arrangement must be considered on a case-by-case basis***, we believe that our refinement of the *Shroyer Test*, as discussed below, can be helpful in establishing parameters for Resellers to determine whether their operations will be considered jurisdictional by this Commission."[10] If interpreted literally, this

[8] *See, e.g.*, Second Entry on Rehearing at ¶49 (stating that "any Commission disclosure requirements for submetering, as suggested by Direct Energy, would only become effective after a finding that the Reseller is a public utility.").
[9] *See* Second Entry on Rehearing at ¶¶ 20, 22, 33.
[10] Second Entry on Rehearing at ¶33 (emphasis added).

means that, in any given complaint case, the Reseller can only be found to be operating as a public utility as to the individual residential sub-metered customer or customers that brought the complaint. As detailed below, such a finding will lead to potentially absurd results that may have a significant impact on both public utilities and the other residential sub-metered customers located at the same premise as the Complainant.

1. Case-by-case application of the Modified *Shroyer* Test, as described in the Second Entry on Rehearing, will produce absurd results.

To begin, case-by-case application of the Modified *Shroyer* Test in a complaint proceeding, as described in the Second Entry on Rehearing, will produce absurd results which are inconsistent with the Commission's goal in this proceeding, *i.e.* protecting all residential sub-metered customers. By its very nature, a complaint proceeding is brought only by those parties that are named Complainants in the case. Thus, the Commission's determination on a "case-by-case basis" regarding a "particular service arrangement" means that the Commission's finding that the Reseller is acting as a public utility only applies to the particular Complainant or Complainants in the proceeding. Accordingly, the Reseller, even after being declared a public utility by the Commission, need not make any changes as it relates to the service it provides to the other residential sub-metered customers located at the same premise as the Complainant.

This result is untenable and inconsistent with the structure of the Modified *Shroyer* Test and Safe Harbors. The Commission clearly intended for the rates the Reseller was charging to all the residential sub-metered customers at a given premise to be examined in these complaint proceedings. Otherwise, the first Safe Harbor provided by the Commission would be completely irrelevant.[11] Further, as detailed below, declaring the Reseller a public utility as it relates to only

[11] *See* Second Entry on Rehearing at ¶40. If the Reseller can be declared a public utility as to only the Complainant, there is no reason for the Commission to analyze what the Reseller is charging other residential sub-metered customers. If the Complainant is the only residential sub-metered customer at issue, then application of the first

a single customer or sub-set of customers at a given premise in a complaint proceeding will create significant issues for other residential sub-metered customers and public utilities.

2. Case-by-case application of the Safe Harbors, as described in the Second Entry on Rehearing, will produce similarly absurd results.

Application of the Safe Harbors on a case-by-case basis in a complaint proceeding, as described in the Second Entry on Rehearing, may also lead to absurd results. The Safe Harbors provide that a Reseller may avoid Commission jurisdiction if: "(1) the Reseller is simply passing through its annual costs of providing a utility service charged by a local public utility and competitive retail electric supplier (if applicable) to its submetered residents at a given premises; or (2) the Reseller's 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."[12] While not explicitly stated, the "individual submetered resident" referenced in the above is, presumably, the Complainant or Complainants that have brought the action against the Reseller.

Application of this Safe Harbor provision on a "case-by-case basis" in the context of each "particular service arrangement" can lead to absurd results even within a single complaint case. For example, in a Complaint case brought by two residential sub-metered customers at the same premise, the Complainant may be named a public utility as to one of the Complainants but not the other because it has only charged one of the Complainants more than what they would have been charged on an annual, total bill basis. This may lead to gamesmanship on the part of Resellers that is inconsistent with the Commission's goals in this proceeding.

Safe Harbor is essentially sanctioning the Reseller's abuse of the Complainant to the benefit of other residential sub-metered customers at the same premise.

[12] Second Entry on Rehearing at ¶40.

3. A finding that a Reseller is operating as a public utility as to only a single residential sub-metered customer, *i.e.* the Complainant, results in significant issues for other residential sub-metered customers and public utilities.

The Commission's current application of the Modified *Shroyer* Test and Safe Harbors on a "case-by-case basis" and in the context of a "particular service arrangement" (assuming this means that the Reseller will be declared a public utility as to only a single Complainant or sub-set of Complainants) could lead to gamesmanship by Resellers which would significantly harm residential sub-metered customers. To begin, this means that a Reseller that is declared to be a public utility in a complaint proceeding need not make any changes to the sub-metering service it provides to other residential sub-metered customers, even at the same premise as the Complainant. Accordingly, a Reseller declared to be a public utility could shift its charges from the Complainant to another residential sub-metered customer at the same premise and simply hope that this other customer does not subsequently file a complaint with the Commission.

This result becomes even more likely given the application of the Safe Harbors on a "case-by-case basis" as well. As discussed above, the first Safe Harbor is applied to each Complainant in a given proceeding. As a result, a Reseller may avoid classification as a public utility simply by shifting its charges to other residential sub-metered customers that are not a party to the Complaint, thereby causing its annual charges to the Complainant to be reduced so that they fall below the threshold for the first Safe Harbor. The Reseller then could do this continually and rotate its charges amongst its residential sub-metered customers at the premise, increasing the likelihood that the customers being over-charged are not parties to the complaint. Such

gamesmanship harms the Reseller's residential sub-metered customers overall and should be discouraged by the Commission.[13]

In addition to these opportunities for gamesmanship, application of the Modified *Shroyer* Test and Safe Harbors on a "case-by-case basis" will lead to operational difficulties and increased expense for public utilities. As discussed above, a Reseller that is declared a public utility must be enjoined immediately from continuing to operate as a public utility immediately. To do so, the Reseller would have several options. First, the Reseller could cease operating as a public utility by reducing its charges to the residential sub-metered customer that brought the Complaint. This response raises many of the gamesmanship concerns discussed above. Second, the Reseller could decide to relinquish its sub-metering service to the customer altogether. It is this option that presents significant difficulties to public utilities if the Modified *Shroyer* Test is applied on a "case-by-case basis."

To begin, application of the Modified *Shroyer* Test on a case-by-case basis means that the Reseller need only make this decision as it relates to a single Complainant. The Reseller, thus, could decide to abandon its service to just the Complainant, leaving the local public utility to provide service to a single customer at the premise. Moreover, in cases where there are multiple Complainants, the Reseller could decide to abandon service to all the Complainants (who do not necessarily reside near one another), leaving the local public utility to provide service to each one, but not the remainder of customers at the premise. Either way, such patchwork application of the Modified *Shroyer* Test will result in increased operational difficulties (and expense) for local

[13] The chances for this gamesmanship also greatly increase if the Reseller operates at multiple premises. There is nothing preventing the Reseller from shifting its charges to a different premise where it believes the residential sub-metered customers are less likely to file complaints or where physical sub-meters are not utilized. Moreover, the Reseller may shift its charges to a different premise within another public utility's certified territory, in an attempt to take advantage of a greater spread between commercial and residential rates.

public utilities and residential sub-metered customers transitioning from sub-metered service to service provided by the local public utility.[14]

4. The Commission should clarify that a Reseller declared to be a public utility in a complaint proceeding brought by a single residential sub-metered customer is operating as a public utility as to, at a minimum, all residential sub-metered customers at the same premise as the Complainant.

To address the issues discussed above, the Commission should grant rehearing and clarify that a Reseller declared to be a public utility in a complaint proceeding brought by a single residential sub-metered customer (or group of such customers) is operating as a public utility as to, at a minimum, all residential sub-metered customers at the same premise as the Complainant. By approaching these complaints in such a manner, the Commission can prevent gamesmanship by Resellers who seek to avoid classification as a public utility simply by shifting charges amongst its residential sub-metered customers at the same premise as the Complainant or Complainants. Moreover, this approach will also require Resellers that are declared a public utility to decide how to cease operating as a public utility as to the entire premise, decreasing the likelihood of a patchwork transition to service from the local public utility. Accordingly, the Companies respectfully request that the Commission grant rehearing on this issue to make the clarifications recommended herein.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission grant rehearing and clarify that: (1) Resellers found to be operating as a public utility in a complaint

[14] There is a long list of problems that may result from a Reseller making the decision to cease providing sub-metered services to previously residential sub-metered customers on a patchwork basis. Included among these are: increased difficulty and inefficiency in planning for the installation of service to individual customers surrounded by customers who are continuing to be served by the Reseller, increased metering costs due to the inefficiencies created by metering an individual customer at a premise, and increased expense and logistical issues for meter reading (as well as increased uncertainty related to the timing of these transitions and associated cost recovery).

proceeding must be enjoined from continuing to operate as a public utility; and (2) Resellers found to be operating as a public utility in a complaint proceeding brought by a single residential sub-metered customer are also operating as a public utility as to, at a minimum, all residential sub-metered customers at the premise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Application for Rehearing of the Second Entry on Rehearing and Memorandum in Support will be served on this 21st day of July, 2017 by the Commission's e-filing system to the parties who have electronically subscribed to this case and via electronic mail upon the following counsel of record:

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Summary: Application --Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Application for Rehearing of the Second Entry on Rehearing and Memorandum in Support electronically filed by Mr. Joshua R. Eckert on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company