BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM OF INDUSTRIAL ENERGY USERS-OHIO OPPOSING APPLICATIONS FOR REHEARING

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JULY 31, 2017

ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

For over two years in various dockets, the Public Utilities Commission of Ohio ("Commission") has conducted an investigation into residential submetering.[1] In December 2016, the Commission issued an order affirming its intention to apply its traditional fact-based test with a modification to the third prong of that test to determine if an entity is operating as a public utility subject to the jurisdiction of the Commission when the entity provides submetering services to residential customers. Finding and Order (Dec. 7, 2016). The modification introduced the Relative Price Test. The Test, if "triggered," would result in a rebuttable presumption that an entity providing utility services was a public utility subject to Commission jurisdiction. The Commission sought additional comments as to what price would "trigger" the rebuttable presumption. *Id*. at 11. After receiving comments and applications for rehearing of its December 2016 Finding and Order, the Commission issued a second entry on rehearing setting the Relative Price Test at zero, i.e., there is a rebuttable presumption that the seller is a public utility if the seller

[1] The genesis of this proceeding was a complaint case filed in April 2015. *Whitt v. Nationwide Energy Partners*, Case No. 15-697-EL-CSS, Complaint (Apr. 10, 2015).

of a utility service sells that service to a submetered residential customer and charges an amount that is greater than what the customer would have been charged through the local public utility's default service tariffs. Second Entry on Rehearing at 1 (June 21, 2017).

Ohio Power Company ("AEP-Ohio") and Duke Energy Ohio, Inc. ("Duke"), jointly, and Ohio Partners for Affordable Energy ("OPAE") seek rehearing of the Second Entry on Rehearing.[2] Duke and AEP-Ohio recommend that the Commission impose tariff restrictions on the resale of electricity. Joint Application for Rehearing of the Second Entry on Rehearing by Ohio Power Company and Duke Energy Ohio, Inc. at 6 & 15 (July 21, 2017) ("Duke and AEP-Ohio Application for Rehearing"). Pushing in another direction, OPAE argues that the Commission should reject the fact-based analysis as the "only" means for determining whether an entity is a utility. Ohio Partners for Affordable Energy's Application for Rehearing from the Second Entry on Rehearing at 3 (July 21, 2017) ("OPAE Application for Rehearing"). Because the outcomes sought by Duke, AEP-Ohio, and OPAE do not comport with Ohio law, the Commission should reject their assignments of error.

Beginning from a complaint with the application of case-by-case review similar to that raised by OPAE, the FirstEnergy electric distribution utilities ("EDUs") urge the Commission to clarify that a reseller declared to be a public utility is operating as a public utility as to all submetered residents at the same premises as the complainant. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison

[2] This memorandum opposing certain aspects of the applications for rehearing should not be taken as approval of the Relative Price Test. As indicated previously, the Commission has already overstepped when it created the Relative Price Test, and there is no reasoned basis for any particular level of such a test. Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio, Ohio Hospital Association and Ohio Manufacturers' Association (Jan. 6, 2017); Comments on the Relative Price Test of Industrial Energy Users-Ohio, Ohio Hospital Association and Ohio Manufacturers' Association (Jan. 13, 2017).

Company's Application for Rehearing of the Second Entry on Rehearing at 4-10 (July 21, 2017) ("FirstEnergy EDUs Application for Rehearing"). There is no need for this clarification since Commission practice already requires an entity to bring its practices into compliance with Commission regulations if the entity is determined to be a public utility in a complaint case.[3]

II. ARGUMENT

A. Duke and AEP-Ohio seek pricing and other tariff restrictions on resellers that would violate Ohio law

Throughout this proceeding, Duke and AEP-Ohio have urged the Commission to apply regulatory constraints on electricity resellers. See, e.g., Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. at 21-26 (Jan. 21, 2016). Their second application for rehearing repeats this refrain. According to Duke and AEP-Ohio, the Commission should engage in price regulation of competitive retail electric service ("CRES") providers and impose tariff restrictions preventing resale. Their proposal goes well beyond what is permitted under Ohio law.

In defining the price that will be used under the Relative Price Test, Duke and AEP-Ohio argue that the Commission "should specify that the price paid by the Reseller to a CRES provider (either affiliated or non-affiliated) should be calculated on a 'net basis.' In other words, if the CRES [provider] and the Reseller are making payments to each other as a result of the Reseller purchasing input services to support its offerings to retail customers, the net of the payment streams should be considered the purchase price that cannot be marked up." Duke and AEP-Ohio Application for Rehearing at 6. Duke and

[3] This memorandum opposing rehearing addresses a subset of the assignments of error in the applications for rehearing filed on July 21, 2017 in this matter. Failure to address a particular assignment of error should not be viewed as agreement or disagreement with that assignment of error.

AEP-Ohio claim this application of the Relative Price Test is necessary to prevent "kickbacks" between the reseller and its affiliated CRES provider. *Id*. Whether kickbacks are or will be a problem is hardly demonstrated; instead, Duke and AEP-Ohio string together a hypothetical problem to support this claim. In any case, however, the Commission is without authority to set the prices of a CRES provider, directly or indirectly. R.C. 4928.03. The solution to any hypothetical kickbacks must be found elsewhere. See R.C. 1331.02 and 1331.04.

Alternatively, Duke and AEP-Ohio urge the Commission to adopt significant tariff restrictions on resale. As they explain in their application for rehearing, "[t]he Commission should clarify on rehearing that its decisions in this docket do not limit or foreclose other avenues of addressing submetering, including utility tariffs concerning that issue." Duke and AEP-Ohio Application for Rehearing at 15. They then note that AEP-Ohio has sought in another proceeding to amend its tariff to limit submetering. *Id*. at 16, citing *Office of the Ohio Consumers' Counsel v. Ohio Power Company*, Case No. 16-782-EL-CSS, Ohio Power Company's Motion for Tariff Amendment (Apr. 27, 2016) ("*OCC Complaint Case*").

In the *OCC Complaint Case*, AEP-Ohio seeks authority to amend its tariff to prohibit submetering by any reseller that marks up the price of service. *OCC Complaint Case*, Ohio Power Company's Motion for Tariff Amendment *passim*.

The problems with AEP-Ohio's solution for the harms of residential submetering were fully demonstrated in the responses filed by other interested parties in the *OCC Complaint Case* and were not limited to residential submetering. Initially, AEP-Ohio's proposal in the *OCC Complaint Case* would extend to any resale of service, not just resale of residential service. *Id.* at 8-9. To date, however, there has been no showing that commercial or industrial customers are in any need of the "protection" that Duke and

AEP-Ohio would require them to accept. *OCC Complaint Case*, Memorandum Opposing Ohio Power Company's Motion for Tariff Amendment by Industrial Energy Users-Ohio at 5 (May 10, 2016). This Commission has recognized as much when it limited the scope of the modifications of the *Shroyer Test* to residential transactions. Second Entry on Rehearing at 10-11 (June 21, 2017).

Additionally, AEP-Ohio's proposal is unlawful. Under R.C. 4928.40(D), an electric utility shall not prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on resale of electric generation service. See, also, *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP, *et al*., Entry at 3-4 (Jan. 18, 2001) ("*FirstEnergy*").

As applied to commercial and industrial shared service arrangements, the AEP-Ohio proposal is also unreasonable for several reasons.

First, AEP-Ohio's proposal would permit an EDU to terminate service to the parties served by a shared services arrangement if any fee is charged, including something as reasonable as an administrative fee agreed to by the parties to the shared services arrangement. While commonsense dictates that the Commission should permit an agreement among sophisticated parties as to collection of administrative costs, the EDU could "turn out the lights" if the EDU decided that the administrative fee was a "markup."

Second, AEP-Ohio's proposal would permit an EDU to terminate service to the parties served by the shared services arrangement if charges among the parties are allocated in a manner other than by "actual usage." Shared service agreements,

however, may be used in instances in which an end user's utility service is not metered. In those instances, there would be no practical way to determine whether the end user is being billed for "actual usage." Even if the end user is metered, however, AEP-Ohio's proposal provides no definition as to what constitutes "actual usage," leaving the EDU with complete discretion to determine under what circumstances it may terminate service.

Third, under AEP-Ohio's proposed restriction on resale, the Commission would be required to police the arrangements among the EDU, master-metered customers, and end users. As the Commission has previously found, the Commission has neither the statutory authority nor the staff to insert itself into the landlord-tenant relationship. *In re Complaints of Inscho v. Shroyer's Mobile Homes,* Case Nos. 90-182-WS-CSS, *et al*., Opinion and Order (Feb. 27, 1992). It is no better positioned to police shared service arrangements.

B. OPAE's rejection of case-by-case review of submetering arrangements misapprehends the applicable law

In an attempt to encourage the Commission to place the burden on "resellers" to register with the Commission, OPAE states broadly that "[i]t is unlawful and unreasonable for the Commission to address protections for residential customers in submetering arrangements only on a case-by-case basis." OPAE Application for Rehearing at 3. OPAE then provides an extended discussion of the benefits of regulation that residential customers would be afforded if the Commission asserted jurisdiction over resellers. *Id*., *passim*. While the concern that residential customers may be adversely affected by submetering may be well-founded, OPAE's assertion that it is unlawful for the Commission to conduct case-by-case reviews of utility status is based on faulty premise and is not supported by Ohio law.

The faulty premise is that the Commission's Second Entry on Rehearing in this case is a limit on the Commission' review process. In fact, there are multiple paths by which the Commission can assert jurisdiction over an entity. Initially, entities that provide utility services are under an obligation to file a tariff with the Commission and subject themselves to Commission regulation. R.C. 4905.05, R.C. 4905.22, & R.C. 4905.32.[4] In the alternative, an entity may seek a determination that it is not operating as a utility. *In the Matter of the Application of Hissong-Kenworth, Inc. Requesting a Declaration Regarding its Public Utility Status*, Case No. 84-565-ST-ARJ, Entry (May 22, 1984). The Commission may also determine that an entity is operating as a public utility subject to its jurisdiction following a Commission investigation initiated by a complaint. *In the Matter of the Complaint of Ken Meek v. Gem Boat Service, Inc., et al.*, 1987 Ohio PUC Lexis 1335, Opinion and Order (Mar. 3, 1987) ("*Gem Boat Service*"). Simply put, the Commission's decision in this investigation did not alter the legal requirement that a public utility be regulated, contrary to the apparent premise of OPAE's argument.

The crux of OPAE's argument in this proceeding, however, seems to be that the Commission should not apply a case-by-case review to determine whether submeterers are public utilities. Under Ohio law, however, there is no categorical answer to the question whether submeterers, condominium associations, or similarly situated entities, including their agents, are public utilities subject to Commission jurisdiction. The determination that an entity is or should be subject to Commission jurisdiction because it operates as a public utility must be addressed on a case-by-case basis.

[4] Additionally, those providing competitive services are subject to a certification process. See, e.g., R.C. 4928.08.

The Commission is a creature of statute; it has only that jurisdiction and authority as provided by the General Assembly. *Columbus S. Power Co. v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.3d 535, 537 (1993). Ohio law limits the Commission's jurisdiction to "public utilities" as that term is defined in Title 49 of the Ohio Revised Code. *See* R.C. 4905.02 and 4905.03.

Under R.C. 4905.02, "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," is a public utility (but this section excludes an "electric light company that operates its utility not for profit," a municipal utility, and "[a] public utility … that is owned and operated exclusively by and solely for the utility's customers"). R.C. 4905.03 provides the functional or operating characteristics for various types of public utilities such as a water-works company, sewage disposal company, or an electric light company.[5] The functional definitions also specify that public utility status is confined to persons engaged in the business of performing the function with regard to consumers in Ohio. *In the Matter of the Application of The Procter & Gamble Company for Relief From Compliance With the*

[5] R.C. 4905.03 provides:

> As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:
>
> …
>
> (C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;
>
> …
>
> (G) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;
>
> …
>
> (M) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

Obligations Imposed by Title 49 of the Ohio Revised Code, Case No. 03-725-HC-ARJ, Entry at 2 (Apr. 10, 2003).

Statutory exceptions also may prevent the Commission from exercising regulatory authority over the provision of services. As noted above, the Commission lacks jurisdiction over cooperative and municipal electric light companies. R.C. 4905.02(A). Also, R.C. 4905.03(E) provides, "The commission, upon application made to it, may relieve any producer or gatherer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as the producer or gatherer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as the producer or gatherer does not engage in the distribution of natural gas to consumers." *See, e.g., In the Matter of the Application of American Landfill Gas Company for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Ohio Revised Code*, Case No. 97-194-GA-ARJ, Entry at 2 (Apr. 17, 1997).

"The statutory definitions, however, are not self-applying." *Pledger v. Pub. Util. Comm'n of Ohio*, 109 Ohio St.3d 463, 465 (2006) ("*Pledger*"). As the Commission and the Supreme Court of Ohio have recognized, the determination of whether a person is a "public utility" within the meaning of R.C. 4905.02 and R.C. 4905.03 and in other contexts is a mixed question of law and fact. *A & B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64 Ohio St.3d 385, 387 (1992). In determining whether an entity is acting as a public utility, the Court stated, "The main and frequently most important attribute of a public utility is a devotion of an essential good or service to the general public which

has a legal right to demand or receive this good or service." *Id*. *See, also, Southern Ohio Power Co. v. Public Util. Comm. of Ohio*, 110 Ohio St. 246, 252 (1924). This factor requires that the business, in order to qualify as a public utility, must "provide its good or service to the public indiscriminately and reasonably." *A & B Refuse Disposers, Inc*., 64 Ohio St.3d at 387. "The second characteristic of a public utility most often addressed by courts is whether the entity, public or private, conducts its operations in such a manner as to be a matter of public concern." *Id*. at 388. The Court, however, noted that no one factor is controlling and several factors must be weighed to determine whether the company's business is conducted in such a manner as to become a matter of public concern. *Id*.

As this case law demonstrates, the Court and the Commission have long recognized that factual differences matter. Simply labelling something as a "utility service" or submeterer is not sufficient to support a determination that a particular entity should be subject to and receive the benefits of public utility status.[6] OPAE's broad assertion that the Commission should not limit its determinations of utility status to only case-by-case reviews ignores that the determination of utility status by its nature requires a case-by-case review.

C. Commission practice requires an entity to comply with its regulations if the entity is determined to be a public utility

Working from the premise that a determination that an entity is a public utility "only applies to the particular Complainant or Complainants," the FirstEnergy EDUs construct

[6] *See, also, In the Matter of the Commission Investigation into the Resale and Sharing of Local Exchange Telephone Service*, Case No. 85-1199-TP-COI, 1986 Ohio PUC LEXIS 39 at *12 (Aug. 19, 1986) (shared tenant services where a third-party provides telecommunications services to the occupants of multi-tenant buildings, complexes, or developed properties through a private branch exchange are not subject to Commission regulation) and R.C. 4905.90(K) (operator of a master-meter natural gas system is not a public utility or a natural gas company for purposes of R.C. 4905.90 to 4905.96).

a list of outcomes which the EDUs describe as "absurd results." FirstEnergy EDUs Application for Rehearing at 7. Based on this view of the effect of a determination of an entity's public utility status, the EDUs then urge the Commission to clarify that a reseller declared to be a public utility is operating as a public utility as to all residential submetered customers at the same premises as the complainant. *Id*. at 10. Because the EDUs' premise is faulty, the need for further clarification is not warranted.

Commission practice has long been that the determination that an entity is operating as a public utility requires the entity to bring its business into compliance with Commission regulation regarding pricing and the supervision of service. In the *Gem Boat Service* case noted above, for example, a complainant sought a determination that a marina operator that also was providing water and sewage service was a public utility. In response to the complaint, the Commission determined that the marina was a public utility and required it to file tariffs. Additionally, the Commission ordered its staff to perform an inspection of the plant facilities. *Gem Boat Service*, 1987 Ohio PUC Lexis 1335, at *26-*32.

A subsequent request to increase charges of the public utility also came under Commission jurisdiction. Following the determination that Gem Beach was a public utility, a successor to Gem Boat Service filed a rate case to set water rates. In response to that application to increase rates, the Commission conducted a standard review of consumer services of the utility. *In the Matter of the Application of Gem Beach Utility Company, Inc. for an Increase in Rates and Charges*, 1994 Ohio PUC Lexis 396 (May 26, 1994).

If an entity is determined to be operating as a public utility at a premises, the entity is subject to Commission regulation. Based on Commission practice, therefore, the

FirstEnergy EDUs' concern that case-by-case determinations of utility status will result in absurd results is not warranted.

At the same time, however, the Commission should apply its case-by-case review carefully because a determination that an entity is operating as a public utility brings the substantial weight of the Commission's authority onto the entity. The unwarranted extension of Commission authority to entities that enter shared service agreements has been a continuing concern of industrial and commercial customers throughout this investigation. As noted previously, industrial and commercial customers have long entered into shared services arrangements that do not trigger Commission oversight because, based on the facts of those arrangements, the arrangements do not provide services to the public indiscriminately and are not a matter of public concern. As a result, these arrangements fall outside the factors both the Supreme Court of Ohio and the Commission have used to determine whether an entity or its agent should be deemed a public utility. Initial Comments of Industrial Energy Users-Ohio at 8-9 (Jan. 21, 2016). That approach is premised on careful fact-based case-by-case reviews and remains sound as a matter of law and policy.

III. CONCLUSION

Although the concerns raised about residential submetering are real, the existence of bad actors does not give the Commission license to impose unlawful and unreasonable resale restrictions or to vacate the well understood and lawful case-by-case determinations whether an entity is subject to Commission jurisdiction. Accordingly, the Commission should reject the assignments of error by Duke, AEP-Ohio, and OPAE that are premised on unlawful tariff restrictions or that would deny case-by-case review of an entity's status as a utility. Further, there is no need to provide the clarification sought by

the FirstEnergy EDUs because a determination that an entity is a public utility brings that entity under Commission jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon persons that the Commission has identified. Service by email has been made to the persons listed below on July 31, 2017.

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Summary: Memorandum Memorandum of Industrial Energy Users-Ohio Opposing Applications for Rehearing electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio