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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of :  
The Toledo Edison Company for : Case No. 96-1083-EL-ATA  
Authority to Amend its General Rules :  
and Regulations. :

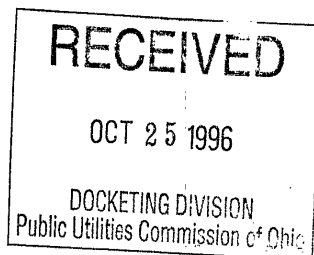
In the Matter of the Application of :  
The Cleveland Electric Illuminating : Case No. 96-1084-EL-ATA ✓  
Company for Authority to Amend its :  
General Rules and Regulations. :

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MOTION TO INTERVENE  
AND  
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE  
OF  
SIMON DEBARTOLO GROUP, INC. AND SIMON PROPERTY GROUP, L.P.,  
dba SIMON REAL PROPERTY GROUP, L.P.

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Barth E. Royer



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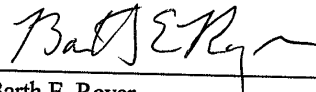
MOTION TO INTERVENE  
OF  
SIMON DEBARTOLO GROUP, INC. AND SIMON PROPERTY GROUP, L.P.,  
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Simon DeBartolo Group, Inc. and Simon Property Group, L.P., dba Simon Real Property Group, L.P. (collectively, "Simon"), hereby move to intervene in the above-captioned proceedings pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11 of the Ohio Administrative Code. As more fully discussed in the accompanying memorandum, Simon submits that it has a real and substantial interest in these proceedings, that it is so situated that the disposition of these proceedings may, as a practical matter, impair or impede its ability to protect that interest, and that its participation in these proceedings will contribute to a just and expeditious resolution of the issues involved. Simon further submits that its interest is not represented by any existing party and that granting its motion to intervene will not unduly delay these proceedings or unjustly prejudice any existing party.

WHEREFORE, Simon respectfully requests that its motion to intervene in these proceedings be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Barth E. Royer", written over a horizontal line.

Barth E. Royer

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE  
OF  
SIMON DEBARTOLO GROUP, INC. AND SIMON PROPERTY GROUP, L.P.,  
dba SIMON REAL PROPERTY GROUP, L.P.

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On October 10, 1996, The Toledo Edison Company ("Toledo Edison") filed the first of the above-styled applications with the Commission seeking authority to amend the provision of its general rules and regulations governing the resale and redistribution of electric service by its customers. In its application, Toledo Edison states that the proposed revisions to Paragraph 19 of its tariff (Second Revised Sheet No. 8 and Third Revised Sheet No. 9 of P.U.C.O. No. 7) are intended to comply with the directive contained in this Commission's May 8, 1996 opinion and order in *Michael E. Brooks and Raoul J. Sartori, dba Little Caesars Pizza, et al., v. Toledo Edison Company*, Case No. 94-1987-EL-CSS (hereinafter "*Brooks*"), wherein the Commission found that, so long as a landlord was not operating as a public utility, Toledo Edison had no authority to restrict the resale or

redistribution of electric service by the landlord to a tenant upon property owned by the landlord and that any tariff provision purporting to do so was void (*see also Brooks*, Entry on Rehearing dated June 27, 1996, at 4). In its order, the Commission instructed Toledo Edison to modify Paragraph 19 of its tariff accordingly and also put other jurisdictional Ohio electric utilities on notice that they should review their own tariffs to assure that any resale provisions contained therein conformed with the Commission's findings in *Brooks* and actual industry practice. On October 10, 1996, The Cleveland Electric Illuminating Company ("CEI"), pursuant to that directive, filed the second of the above-styled applications by which it seeks approval of an amended resale tariff provision similar to that proposed by Toledo Edison.

Simon DeBartolo Group, Inc. and Simon Property Group, L.P., dba Simon Real Property Group, L.P. (collectively, "Simon") are, respectively, the general partner and management agent for North Towne Square Mall, the Toledo, Ohio shopping mall whose redistribution practices were the subject of the *Brooks* complaint.<sup>1</sup> As a Toledo Edison customer, Simon clearly has a real and substantial interest in proposed changes to a tariff provision which purports to govern the terms and conditions pursuant to which it may provide electrical service to its tenants. Moreover, notwithstanding that proposed Paragraph 19(I)(b) of the tariff is apparently intended to grandfather North Towne Square Mall by

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<sup>1</sup> Simon DeBartolo Group, Inc. is the successor in interest to Simon Property Group, Inc., one of the original named respondents in the *Brooks* complaint. Although Simon was dismissed as a party respondent, it subsequently intervened in the case and actively participated in the proceeding.

exempting the arrangement by which it provides electric service to tenant premises from the new resale and redistribution restrictions, Simon, as the country's largest commercial developer and manager of commercial rental properties, may become subject to these restrictions as new properties are developed or acquired, not only in the Toledo Edison service territory, but in that of CEI as well. Indeed, to the extent that the Commission's decision on these applications could serve as precedent for similar provisions in the tariffs of other Ohio electric utilities, Simon could become subject to these restrictions in connection with facilities throughout this state. Thus, Simon's interest in this proceeding -- an interest not represented by any other party -- clearly extends beyond its interest as a customer of Toledo Edison at North Towne Square Mall.

Section 4909.18, Revised Code, requires the Commission, in considering an application not for an increase in rates, to make a threshold determination whether the proposals contained in application may be unjust and unreasonable, and, in the event it so finds, to set the matter for hearing. Simon submits that the resale provisions in these proposed tariffs are, on their face, unjust and unreasonable. Not only are the proposed revisions totally inconsistent with the Commission's directive in *Brooks*, but they impose conditions which are at odds with sound public policy. Moreover, the proposed tariffs are so unartfully drafted and so fraught with internal inconsistencies that, if approved, they would do nothing but increase the confusion which prompted the Commission to order their revision in the first place. Although Simon believes that there is no question that the proposals contained in these applications are unjust and unreasonable, even the most cursory

review will support a finding that they "may be" unjust and unreasonable. Clearly, the statutory requirement that a hearing be held has been triggered.

First, the plain message of *Brooks* is that an electric utility has no valid right or interest in attempting to prohibit or economically regulate the resale or redistribution of electric service by a landlord to tenants upon property owned by the landlord where the landlord is not otherwise operating as a public utility. (*Brooks*, Opinion and Order dated May 8, 1996, at 16-17; *Brooks*, Entry on Rehearing dated June 27, 1996, at 5). However, the tariff language proposed in the instant applications is even more restrictive than the Toledo Edison tariff language the Commission declared to be void. The proposed language clearly impinges on the landlord-tenant relationship by, *inter alia*, prohibiting the landlord from providing electric service to a tenant unless a specific charge is imposed for the service provided [see Proposed Toledo Edison Paragraph 19(I)(c) and Proposed CEI Paragraph 6(a)(2)(c)];<sup>2</sup> restricting the arrangement by which a landlord may provide electric service to residential tenant premises [*id.*]; restricting the arrangement by which a landlord may provide electric service to tenant premises based upon the nature of the premises [see Proposed Toledo Edison Paragraph 19(I)(d) and Proposed CEI Paragraph 6(a)(2)(d)]; prohibiting shopping malls from taking single delivery point service from the host electric utility and requiring the individual tenants to become customers of the utility [see Proposed Toledo

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<sup>2</sup> Interestingly, in the case of Toledo Edison, this completely reverses the prior policy, which was to prohibit submetering and the imposition of any charge for the electricity provided by a landlord to tenant premises.

Edison Paragraph 19(I)(e) and Proposed CEI Paragraph 6(a)(2)(e)]; and requiring the tenant of a single-tenant building to be the customer of the host electric utility [see Proposed Toledo Edison Paragraph 19(I)(f) and Proposed CEI Paragraph 6(a)(2)(f)]. For Toledo Edison and CEI to suggest that these provisions comply with the directive in *Brooks* is an affront to the Commission.

Second, even if the Commission were to ignore that the proposed tariff revisions are totally inconsistent with *Brooks*, the Commission should still find that certain of the proposals contained therein may be unjust and unreasonable on the grounds that they are contrary to sound public policy. For example, while the demand reductions, energy conservation benefits, environmental and aesthetic advantages, and overall cost savings made possible by single delivery point service to enclosed malls were thoroughly documented in *Brooks* (see Testimony of Linda B. Hagadone, Simon Exhibit 1, at 8-12 and LBH-1), the proposed Toledo Edison and CEI resale restrictions would prohibit a single delivery point arrangement [see Proposed Toledo Edison Paragraph 19(I)(e) and Proposed CEI Paragraph 6(a)(2)(e)]. Similarly, while it is clearly in the public interest that landlords and tenants be free to enter into arrangements which result in the most cost-effective way of making electric service available to tenant premises, the proposed tariff provisions would insert the host electric utility into the landlord-tenant relationship in a manner that bears no relation to any legitimate public policy objective. Indeed, as the Commission noted in its opinion and order in *Brooks*, Toledo Edison is ill-suited to enforce its existing resale provision (*Brooks*, Opinion and Order dated May 8, 1996, at 15). Clearly, neither Toledo Edison or CEI are any



better-equipped to enforce the proposed tariff provisions, nor should they be cast in this role.

Finally, quite apart from these substantive concerns, the Commission should find that the proposed tariffs may be unreasonable simply on the basis that the language is imprecise, contradictory, and otherwise poorly crafted. For example, if proposed Paragraph 6(a)(2) of the CEI tariff were strictly construed, no person could permit houseguests to plug in their hair dryers or electric razors without obtaining specific written permission from the company. Indeed, the same can be said of Paragraph 19(I) of the Toledo Edison tariff due to the unusual definitions of "Submetering" and "Redistribution" contained therein. In normal parlance, "submetering" means just that, *i.e.*, a landlord-customer of a utility metering the electricity actually consumed by as tenant and charging the tenant for its use of electricity based on its actual consumption. "Redistribution," on the other hand, is generally understood to refer to any of the wide variety of arrangements by which a landlord-customer of the utility makes electric service available to tenant space, regardless of how the landlord is compensated for providing the service. However, by defining "redistribution" as furnishing electric energy "without making any specific charge with respect there to," the proposed resale provisions would operate to produce all sorts of unintended results.

Although these language problems are undoubtedly moot in light of *Brooks*, Simon would also note that the proposed tariffs are replete with inconsistencies. For instance, Paragraph 19(I)(c) of the proposed Toledo Edison tariff and Paragraph 6(a)(2)(c) of the CEI tariff state that the customer "may only redistribute electric service for residential use," while

proposed Toledo Edison Paragraph 19(I)(d) and proposed CEI Paragraph 6(a)(2)(c) state that "redistribution will be permitted for buildings used primarily for office purposes." Similarly, while Paragraph 19(I)(c) of the proposed Toledo Edison tariff and Paragraph 6(a)(2)(c) of the CEI tariff seem to permit a customer to provide electric service to residential tenants so long as no specific charge is imposed, proposed Toledo Edison Paragraph 19(I)(f) and proposed CEI Paragraph 6(a)(2)(f) would prohibit such an arrangement for a single-family dwelling. In short, even if Toledo Edison and CEI had a valid right or interest in attempting to control resale or redistribution in the landlord-tenant setting, which they do not, there is no rhyme nor reason to the restrictions they are attempting to impose through these applications.<sup>3</sup>

Simon respectfully submits that now is the time for the Commission to scrutinize these proposed tariff provisions very carefully.<sup>4</sup> Although an evidentiary hearing may not be required, at minimum an exchange of comments is in order. Simon's intervention will not delay this process or unjustly prejudice any existing party. As it demonstrated in *Brooks*,

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<sup>3</sup> Simon would also point out that, even if these utilities had the authority to insert itself into the landlord-tenant relationship in this fashion, the proposed tariffs lack any enforcement mechanism. This is a most significant omission in view of the Commission's finding in *Brooks* that tariff provisions of this type do not create third-party rights (*Brooks*, Opinion and Order dated May 8, 1996, at 16).

<sup>4</sup> The applicants in these cases should be required to shoulder the burden of demonstrating that the proposed resale provisions are just and reasonable. If this issue is not squarely decided now, landlord-customers seeking service in the future will be forced to complain against these provisions if they wish to enter into cost-effective arrangements with their tenants. Customers should not be required to bear this burden.

Simon has substantial experience and expertise in this area and its participation will contribute to a just and expeditious resolution of the issues involved in this proceeding.

For those reasons set forth above, Simon respectfully requests that its motion to intervene be granted, that the Commission find that these applications contain proposals which may be unjust and unreasonable, and that the Commission schedule such further proceedings as it deems appropriate in order to consider fully the issues involved.

Respectfully submitted,

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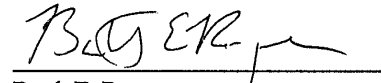
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CERTIFICATE OF SERVICE

I hereby certify that a true copy fo the foregoing motion to intervene and supporting memorandum has been served uon the following parties by first class mail, postage prepaid, this 25<sup>th</sup> day of October 1996.

  
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