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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 the Transition Plans and For Authorization to Collect Transition Revenues	)))))))	Case No. 99-1212-EL-ETP Case No. 99-1213-EL-ATA Case No. 99-1214-EL-AAM

OHIO BUILDING OWNERS AND MANAGERS ASSOCIATION REPLY COMMENTS REGARDING THE ISSUE OF SALES FOR RESALE

Of the 10 persons filing Comments in response to Finding (9) of the Commission's November 21, 2000, Entry, three invited the Public Utilities Commission to try to expand its jurisdiction into private lease contracts and to begin regulating and/or certifying submetering landlords, whose activities have been approved by Ohio law for three-quarters of a century. The Ohio Building Owners and Managers Association ("Ohio BOMA") hereby replies to those comments of FirstEnergy Corp. ("FirstEnergy"), Ohio Council of Retail Merchants ("OCRM") and Appalachian People's Action Coalition ("APAC").

FirstEnergy understates the issue when it suggests that it is proposing only "some restriction on resale and redistribution and, in particular," trying to keep a utility from being "forced to abandon existing direct service to a tenant." FirstEnergy Comments, top of p. 2. OCRM and APAC are more candid. Beginning at page 4 of its Comments, OCRM argues that submetering landlords should be certified under R.C. 4928.08(B) and regulated as public utilities under R.C. 4905.03 and 4928.01(A)(7). OCRM also asks the Commission to relieve submetered tenants from parts of their private lease contracts. APAC argues at pages 2 through 6 of its

Comments that Am. Sub. S. B. 3 expanded Commission jurisdiction to regulate submetering landlords as public utilities.

Ohio BOMA submits that acceptance of these arguments would cause huge practical, financial and legal consequences, as discussed at pages 6 through 8 of its December 6 Comments. By overruling Jonas v. The Swetland Co. (1928), 119 Ohio St. 12, Shopping Centers Assn. v. Pub. Util. Comm. (1965), 3 Ohio St. 2d 1 and Brooks v. Toledo Edison Co. (1996), PUCO Case No. 94-1987-EL-CSS, 169 P.U.R. 4th 179, the Commission would

1. Disrupt the design, construction, operation and maintenance of office buildings, apartment houses and shopping centers throughout the State of Ohio.

2. Interfere with the rights of landowners to manage and develop their private property.

3. Compel the rewiring of submetered buildings in order to provide separate access by each provider of retail electric service to each tenant.

4. Enable electric utility companies to impose these unnecessary rewiring costs upon tenants under R.C. 4928.15(A) and 4928.35(C).

5. Either force hundreds of submetering landlords to become regulated electric utilities or – in recognition of the limits of R.C. 4933.81, et seq. – force landlords to turn over their submetering facilities to their friendly electric utility – an unlawful taking of the landlord's private property without due process of law. In the alternative, the Commission might try to hypothecate an elaborate compensation scheme analogous to Am. Sub. S. B. 3's methodology for measuring and recovering utility transition costs.

6. Either interfere with thousands of lease contracts which have relied upon three-quarters of a century of Ohio law authorizing electric submetering or provide for an extended transition period for phasing out these private contracts over their remaining terms.

Ohio BOMA respectfully submits that neither existing law nor Am. Sub. S. B. 3 compel these consequences. Nor does the $10 billion stipulation in FirstEnergy's ETP cases, which failed to mention this subtle change to part of one page of FirstEnergy's Standard Rules and Regulations out of the thousands of pages making up FirstEnergy's transition plan filing.

Reply Comments

At page 2 of its Comments, FirstEnergy inaccurately limits the issue to "landlord interference with an existing customer relationship" and tries to prejudice the issue by condemning landlords who might "impose, unfettered, their will on tenants." As an alternative, the company proposes that it be allowed to impose, unfettered, its will on each landlord by interfering with a landlord's right to develop and manage its private property.

FirstEnergy then tries to reargue the Brooks order, which was approved by this Commission over four years ago. FirstEnergy Comments, p. 3. The company declares that the Commission's reliance upon the Ohio Supreme Court's Shopping Centers decision was ill-placed; because Shopping Centers simply decided that the landlord was the consumer. However, if FirstEnergy's argument were adopted, a utility serving a submetered shopping center would have two layers of consumers – both the landlord and the tenants; and both the landlord and the tenants could demand service at tariff rates and could require the utility to extend its distribution facilities to them. The Supreme Court in Shopping Centers did not have this in mind at all. At page 4 of its decision the Court noted among the benefits of landlord submetering was that the utility "... thereby escaped the expense of installing and maintaining equipment to extend its operations" to the landlord's tenants. Shopping Center Ass'n. v. Pub. Util. Comm. (1965), 3 Ohio St. 2d 1, at 4.

FirstEnergy conveniently overlooks the earlier Jonas decision of the Ohio Supreme Court, which held that a submetered tenant's rights to electric service were defined by "the terms of its voluntary contract ... voluntarily agreed upon by [tenant] and the [landlord] as one of the terms of the lease and as part of the consideration thereof." Jonas v. The Swetland Co. (1928), 119 Ohio St. 12, at 16-17.

FirstEnergy suggests at page 4 of its Comments that Am. Sub. S. B. 3's definition of "retail electric service" at R.C. 4928.01(A)(27) and declaration of policy at R.C. 4928.02 overruled by implication three-quarters of a century of Ohio law; imposed new restrictions upon the design, construction, operation, maintenance, management and development of real property; and superceded thousands of landlord/tenant lease agreements in Ohio. The company contends that the statute's references to "ultimate consumers", "point of consumption", and "consumers", were different from the Supreme Court's definition of "consumer" in the Shopping Centers decision.

However, Am. Sub. S. B. 3 made no change to the meaning of "consumer" in R.C. 4905.03(A)(4), as determined by the Ohio Supreme Court in its Shopping Centers decision. The re-enactment of R.C. 4905.03(A)(4) - in all material respects unchanged - creates a presumption of legislative adoption of this judicial construction. R.C. 1.54; Doll v. Barr (1898), 58 Ohio St. 113; State v. Glass (1971), 27 Ohio App. 2d 214. This rule of construction applies also to the Commission's prior administrative interpretation in its Brooks decision. Bailey v. Evatt (1944), 142 Ohio St. 616.

FirstEnergy then tries to overcome the inconvenient mandate of R.C. 4928.40(D) by concluding that landlords are not entitled to the protection of the statute. FirstEnergy Comments, p. 5. The company argues that the statute's mandate that "no electric utility in this state shall prohibit the resale of electric generation service" actually means that any electric utility in this state may prohibit the resale of electric generation service by a landlord. The company's Orwellian creativity turns on its assertion that "Surely the legislature did not intend to prohibit electric utilities from restricting resale of electric generation service while at the same time permitting landlords ... to do so." The company cites no source or authority for its contradiction of the express language of R.C 4928.40(D).

Of particular concern to property owners is FirstEnergy's argument at the bottom of page 5 of its Comments that FirstEnergy is entitled to permanent, unrecorded encumbrances upon a landlord's private property and to restrictions upon a landlord's existing and future lease contracts with its tenants. The company hypothecates that since landlords might "interfere with and supercede existing arrangements tenants may have" with their electric utilities or suppliers; FirstEnergy should be entitled to interfere with and supercede "existing arrangements" landlords may have with their tenants. FirstEnergy's proposal would transform its month-to-month, terminable, tariff arrangements into permanent, unrecorded encumbrances upon a landlord's property.

FirstEnergy even suggests that the Public Utilities Commission should be available as a forum to hear submetered customer complaints about utility services which the customers have agreed by their lease contracts to accept from their submetering landlord. FirstEnergy Comments, top of p. 6. The suggestion ignores the limits upon the Commission's jurisdiction, which prevent it from judging contractual rights and obligations:

> The judicial power of the state is vested in courts, the creation of which and their jurisdiction is provided for in the judicial article of the constitution, Article IV. The public utilities commission is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights.

New Bremen v. Pub. Util. Comm. (1921) 103 Ohio St. 23 at 30-31. See e.g. Huenke v. Ohio Edison Co., PUCO Case No. 5767, [1929] O.P.U.C.R. 243.

FirstEnergy also overlooks the right of tenants not to participate in submetered electric service: Tenants accept submetered electric service only after voluntarily signing a private lease contract; and tenants may avoid such submetered service by not signing or renewing a private lease contract.

FirstEnergy wraps up its Am. Sub. S. B. 3 argument by attacking landlords with unsupported charges of "disenfranchisement" and a statistical extrapolation that one million consumers may have their benefits of choice "snatched from them by landlords." FirstEnergy Comments, p. 7. As noted above, submetering is a matter of "voluntary contract ... voluntarily agreed upon by [tenant] and the [landlord] as one of the terms of the lease and as part of the consideration thereof." Jonas v. Swetland Co. (1928), 119 Ohio St. 12, at 16-17. Lease contracts are matters of choice just as much as electric service contracts are matters of choice; and Am. Sub. S. B. 3 does not order that the former should be sacrificed for the benefit of the latter.

FirstEnergy closes by arguing that this resale and redistribution issue was decided when the Commission approved the stipulation settling the FirstEnergy ETP cases. However, that stipulation did not refer to this issue – which only appeared at part of one page of FirstEnergy's proposed "Standard Rules and Regulations" within hundreds of pages of tariffs and thousands of pages of ETP pleadings that were the subject of the $10-billion settlement of those cases. Ohio BOMA submits that this adjusted, partial page of Rules and Regulations buried in thousands of pages of ETP pleadings and unmentioned in the $10-billion settlement cannot be relied upon for reversing the Supreme Court's decisions in Jonas and Shopping Centers, reversing the Commission's decision in Brooks, imposing permanent utility encumbrances upon the private property of landlords, changing the legal basis upon which multi-tenant real estate has been designed, constructed, operated, maintained, managed and developed for three-quarters of a century, and expanding the jurisdiction of this Commission to adjudicate and supercede the terms of private lease contracts between landlords and tenants.

Ohio BOMA would also point out that because the proposed restriction on resale and redistribution violates the express mandate of R.C. 4928.40(D), a stipulation of such

violation of statute would be unlawful and unenforceable. E.g., Farmer v. Columbiana County Telephone Co. (1905), 72 Ohio St. 526.

OCRM's comments add little to what has been discussed in FirstEnergy's comments above. However, OCRM makes clear at page 4 of its Comments that it wants the Commission to relieve submetered tenants of the submetered utility service obligations to which they voluntarily agreed in private lease contracts, by arguing that "Ultimate consumers, including commercial establishments that consume electricity in multiple tenant situations must be provided access to competitive supplies of electricity. See U.S. Constitution, Art. I, Sec. 10, and Ohio Constitution, Art. II, Sec. 28, contra.

OCRM also contends at pages 4 through 6 of its Comments that it wants the Commission to certify submetering landlords under R.C. 4928.08(B) and to regulate them as electric light companies through R.C. 4905.03 and 4928.01(A)(7). However, OCRM overlooks the statutory limitation on that authority to certify and to regulate. That authority turns on the definition of "an electric light company." Compare R.C. 4928.01(A)(11), (9), (5) and (13) with R.C. 4928.01(A)(7). R.C 4928.01(A)(7) states that "Electric light company" has the same meaning as in section 4905.03 of the Revised Code. R.C. 4905.03 defines an "electric light company" as "engaged in the business of supplying electricity ... to consumers." This definition was in all material respects unchanged by Am. Sub. S. B. 3. Under this same definition, the Supreme Court of Ohio has held that a submetering landlord "is not a public utility" but a consumer. Jonas v. The Swetland Co. (1928), 119 Ohio St. 12, at 16; Shopping Centers Ass'n. v. Pub. Util. Comm. (1965), 3 Ohio St. 2d 1, at 4. The re-enactment of R.C. 4905.03(A)(4) - in all material respects unchanged - creates a presumption of legislative adoption of this judicial construction. R.C. 1.54; Doll v. Barr (1898), 58 Ohio St. 113; State v. Glass (1971), 27 Ohio

App. 2d 214. The same rule of construction applies to the Commission's prior administrative interpretation in Brooks. Bailey v. Evatt (1944), 142 Ohio St. 616.

The APAC Comments suffer from similar disabilities. At pages 2 through 6 of its Comments, APAC argues that submetering landlords should be regulated by the Public Utilities Commission as public utilities. Thus, it argues that Am. Sub. S. B. 3 overruled by implication the Jonas and Shopping Center decisions of the Ohio Supreme Court and the Brooks decision of this Commission. The APAC argument also assumes that Am. Sub. S. B. 3 authorizes the Public Utilities Commission to supercede the terms of private and voluntary real estate lease contracts in order to replace those contracts with Public Utilities Commission regulation. See U.S. Constitution, Art. I, Sec. 10, and Ohio Constitution, Art. II, Sec. 28, contra.

Conclusion

The law of Ohio has clearly held that the resale or redistribution of electric service by a landlord to its tenants upon the landlord's private property – where the landlord is not operating as a public utility – is not a public utility service; and the landlord is the ultimate consumer of such electric service. Nothing in Am. Sub. S. B. 3 or the stipulation of FirstEnergy's ETP cases changed that policy, which has been honored by the Supreme Court of Ohio and this Commission for three-quarters of a century. Nor did the statute ambush landlords and by implication order profound changes to the design, construction, operation, maintenance, management and development of private property or to the thousands of private lease contracts defining the physical and financial relationships between landlords and tenants throughout this State.

If the Public Utilities Commission decides to review this issue further, then the Ohio Building Owners and Managers Association respectfully requests the opportunity to file for intervention and to have the right to contribute to a record for demonstrating the profound impact of any such overruling of Ohio's law on the resale, redistribution and submetering of electric service by a landlord to its tenants.

Respectfully submitted,

OHIO BUILDING OWNERS AND
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CERTIFICATE OF SERVICE

I certify that the Ohio BOMA Comments above have been served December 13, 2000, by e-mail to all parties on the service lists of all Ohio ETP cases.

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Sheldon A. Taft