

**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
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**INITIAL COMMENTS OF  
THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF GREATER  
CLEVELAND**

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**I. INTRODUCTION**

The Building Owners and Managers Association of Greater Cleveland ("BOMA Cleveland") respectfully submits these Initial Comments in response to the Public Utilities Commission of Ohio's ("Commission" or "PUCO") December 16, 2015 Entry (the "Entry") opening this docket to obtain stakeholder views on a series of questions pertaining to submetering in Ohio.

BOMA Cleveland members represent nearly 40 million square feet of office space in the greater Cleveland area that houses more than 2,000 companies with existing lease agreements. A departure from the *Shroyer*<sup>1</sup> test by the Commission would have significant and widespread consequences for landlords and commercial building owners. The costs associated with changing internal electrical distribution will reduce the ability for landlords and commercial building owners to make other investments, such as energy efficiency improvements or new infrastructure buildout. Moreover, Commission jurisdiction over landlord submetering could result in significant interference with the existing negotiated contracts between the landlord and tenant. BOMA Cleveland members simply do not enjoy the powers and privileges of a public utility to

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<sup>1</sup> See, *Inscho, et al. v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al. (February 27, 1992).

justify such Commission interference with freely negotiated contracts, nor do commercial tenants need regulatory oversight.

For all of these reasons, BOMA Cleveland respectfully requests that the Commission not depart from existing, long standing regulatory policy expressed in *Shroyer*.

## II. COMMENTS TO COMMISSION'S QUESTIONS

The Commission's Entry requests stakeholder responses to three questions concerning submetering. BOMA Cleveland's responds to these questions below.

### A. Are condominium associations and similarly situated entities, including third-party agents of those entities, public utilities pursuant to the Shroyer test?

No. In *Shroyer*, the Commission adopted the following three-part test to determine if a mobile home park owner, which provided water and sewer services to tenants' trailers, was operating as a public utility:

- (1) Does the landlord avail itself of the special benefits available to public utilities (e.g. - public franchise, public right of way, or the right of eminent domain in the construction or operation of its service)?
- (2) Does the landlord only provide the utility service to its tenants rather than the general public?
- (3) Is the provision of the utility service clearly ancillary to the landlords' primary business?

In *Shroyer*, the Commission determined that the landlord/trailer park operator was not a public utility. Subsequently, the PUCO has applied the *Shroyer* test in multiple cases when asked to determine an entity's public utility status.<sup>2</sup>

The *Shroyer* test, as adopted by the Commission, is a straightforward and practical test which recognizes that public utility status has long been the subject of judicial determination.

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<sup>2</sup> See e.g., *Brooks v. Toledo Edison Company*, PUCO No. 94-1987-EL-CSS (Order, May 8, 1996), 1996 Ohio PUC Lexis 292, at 34-35; and *Cleveland Electric Illuminating Company v. Medical Center Company*, PUCO Case No. 95-458-EL-UNC (Order, August 10, 1995), 1995 Ohio PUC Lexis 622.

The determination of whether a person is a “public utility” is a mixed question of fact and law. *Campanelli v. AT&T Wireless Service*, 85 Ohio St. 3d 103, 106 (Ohio 1999). An entity may be characterized as a public utility “if the nature of its operation is a matter of public concern, and membership is indiscriminately and reasonably made available to the general public.” *Id.*

Under the *Shroyer* test, BOMA Cleveland members are not public utilities. First, commercial real estate owners who serve as landlords do not receive any special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right of way for utility purposes. Second, BOMA Cleveland members only provide, or arrange for, utility service for tenants under a freely negotiated contract; no service is provided to the general public. And finally, the provision of utility service is ancillary to BOMA Cleveland members’ primary businesses. The conclusion that BOMA Cleveland members are not public utilities is consistent with prior Commission decisions applying *Shroyer*.

Perhaps more important is the fact that the Ohio Supreme Court has already determined that landlords are *consumers* of utility service, even though they resell that service to their tenants. *Pledger v. PUC*, 109 Ohio St. 3d 463, 469 (2006), citing *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371 (2002). In *FirstEnergy Corp. v. Pub. Util. Comm.*, the Court held that the energy supplier was not allowed to restrict the resale of electric service by a landlord to a tenant if the resale took place only on the landlord's property. The Court, citing precedent, held that "office buildings, apartment houses, and shopping centers are 'consumers' of electricity even though these consumers may resell, redistribute, or submeter part of the electrical energy to their tenants." *Id.* Since landlords are not the suppliers of utility services, but rather consumers of these services, they are not public utilities subject to the Commission’s jurisdiction.

**B. Are there certain situations in which the Shroyer test cannot or should not be applied? If the Shroyer test cannot or should not be applied, what test should the Commission apply in those situations?**

As discussed above, the *Shroyer* test is consistent with Ohio Supreme Court precedent. The *Shroyer* test has long been successfully applied by the Commission to determine whether an entity is a public utility. The Commission should not abandon its longstanding and proven precedent simply because a party does not like a particular result.

**C. What impacts to customers and stakeholders would there be if the Commission were to assert jurisdiction over submetering in the state of Ohio?**

A departure from the *Shroyer* test by the Commission could have significant and widespread consequences for landlords and commercial building owners. The inability to submeter tenants would require substantial changes to the internal electric distribution of the majority of buildings used primarily for office purposes in Northeast Ohio and throughout the State of Ohio. In many cases, these buildings have had existing electrical infrastructure in place for more than 50 years. The associated costs of changing internal electrical distribution would reduce the ability to use those funds to finance energy efficiency programs and new development throughout the state.

Moreover, if the Commission were to assert jurisdiction over landlord submetering, it would create interference with, and impair, the prevailing contract between tenant and landlord governed by the lease arrangement and the basis for total cost of real estate occupancy that is set by market conditions when the lease is signed. Tenants could potentially use the Commission to alter the price of service in certain circumstances. The Commission could also become a tenant complaint department regarding the quality of the landlords' service, and overall alter the basis for providing a rental lease agreement.

### III. CONCLUSION

The *Shroyer* test is longstanding test that reflects practical policy considerations and Ohio Supreme Court precedent. BOMA Cleveland believes that the Commission should not depart from the *Shroyer* test and assert jurisdiction over submetering. BOMA Cleveland reserves the right to file additional comments in this case.

Respectfully submitted,



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Summary: Comments of The Building Owners and Managers Association of Greater Cleveland electronically filed by Teresa Orahod on behalf of Glenn S. Krassen